TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1923

No. [redacted]74

THE SALEM TRUST COMPANY, PETITIONER,

vs.

MANUFACTURERS' FINANCE COMPANY *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 10, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 6, 1922.

(29,024)

(29,024)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 474.

THE SALEM TRUST COMPANY, PETITIONER,

vs.

MANUFACTURERS' FINANCE COMPANY *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Caption in circuit court of appeals	1	1
Transcript of record from U. S. district court for district of Massachusetts	1	1
Title of case in district court	1	1
Record from superior court for Suffolk County	1	1
Bill of complaint	2	2
Subpœna and return thereon	6	5
Appearances	7	6
Answer of International Trust Company	8	7
Petition of Manufacturers' Finance Company for removal (allowed)	9	8
Affidavit of notice of motion	11	10
Affidavit of service of notice	11	10
Removal bond	12	11
Dockets entries	14	13
Motion to remand and order denying	15	14
Motion to amend answer and amended answer and order allowing	16	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1922.

	Original.	Print.
Agreed facts	17	16
Exhibit No. 1—Agreement, October 6, 1919, between Manufacturers' Finance Co. and Salem Trust Co.	20	18
Hearing	22	19
Final decree	23	20
Claim of appeal and allowance thereof	23	20
Plaintiff's requests for rulings and findings	23	20
Memorandum of decision, Anderson, J.	24	21
Petition for appeal	25	22
Assignment of errors	26	22
Waiver of bond by International Trust Company	27	23
Waiver of bond by Manufacturers' Finance Company	27	23
Stipulation as to printing exhibits	27	23
Agreement as to record on appeal	28	24
Citation and service	29	25
Certificate of clerk of district court	30	26
Opinion, Bingham, J.	31	26
Dissenting opinion, Brown, J.	34	28
Hearing	51	39
Final decree	51	39
Motion for stay of mandate	51	39
Order staying mandate	52	39
Certificate of clerk of circuit court of appeals	52	40
Writ of certiorari and return	53	40

1 United States Circuit Court of Appeals for the First Circuit,
October Term, 1920.

No. 1515.

THE SALEM TRUST COMPANY, Plaintiff, Appellant,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants, Appellees.

Transcript of Record of District Court.

No. 1058, Equity Docket.

THE SALEM TRUST COMPANY, Plaintiff,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants.

This cause was begun in the Superior Court of the County of Suffolk and Commonwealth of Massachusetts, and was thence removed from said Superior Court and entered in this District Court, at the December Term, A. D. 1920, and is in the words and figures following:

Record of State Court.

[Filed in District Court January 10, 1921.]

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case:

2 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

In Equity.

Between

THE SALEM TRUST COMPANY, a Banking Corporation Organized under the Laws of the Commonwealth of Massachusetts, with a Usual Place of Business in Salem, Essex County, Massachusetts, Plaintiff,

and

MANUFACTURERS' FINANCE COMPANY, a Corporation Organized under the Laws of the State of Delaware and Having a Usual Place of Business in Boston, Suffolk County, Massachusetts, and The International Trust Company, a Banking Corporation Organized under the Laws of the Commonwealth of Massachusetts, with a Usual Place of Business in said Boston, Defendants.

Bill in Equity.

Bill of Complaint.

1. The plaintiff says that at and prior to the 16th day of May, 1919, it had loaned to the Nelson Blower & Furnace Company the sum of forty-thousand dollars ($40,000) upon its note secured by the pledge of sundry forms of collateral, at all times agreed to be in excess of the amount of said loan, said collateral consisting in part of cash and personal property and in part of assigned accounts of money due to the said corporation; that on or about said date, the Nelson Blower & Furnace Company desired to procure a release of one of said assigned accounts due from the Remington Arms Union Metallic Cartridge Company, and to substitute another similar account of another corporation in its room and stead. The plaintiff agreed to said substitution and the Nelson Blower & Furnace Company thereupon executed an assignment of sums of money then due or thereafter to become due from the Murray & Tregurtha Corporation, by an instrument in writing, a copy of which is hereto annexed and marked "Exhibit A". That thereafter, to wit, on or about the fifteenth day of July, 1919, the said Nelson Blower & Furnace Company executed, or attempted to execute, to the
3 said defendant, the Manufacturers' Finance Company, an assignment of the same account arising out of the same contract with the Murray & Tregurtha Corporation, and without disclosing to it, as the plaintiff believes, the prior assignment to the Salem Trust Company, Exhibit A; that on September 26, 1919, the said Nelson Blower & Furnace Company was placed in the hands of a receiver by a decree of the District Court of the United States for

the District of Massachusetts, sitting at Boston, and that thereafter the receiver, F. Alexander Chandler, conducted said business until sometime in April of the year 1920, when all manufacturing operations were terminated.

2. The plaintiff says that at or about the time of said receivership, it learned for the first time of the assignment of accounts to the Manufacturers' Finance Company, and that thereupon both parties claimed the proceeds then due or thereafter to become due from the said Murray & Tregurtha Corporation. The plaintiff further says that the accounts assigned to it and now claimed by the Manufacturers' Finance Company were payments due and to become due upon a contract for the construction of thirty (30) engines for the said Murray & Tregurtha Corporation, from materials which it supplied; that at the time of said receivership the contract for the construction of said engines was only partially completed and that by reason of said partial completion, the Murray & Tregurtha Corporation claimed that there was nothing due until such time as the contract was fully completed; that the receiver of the Nelson Blower & Furnace Company was unwilling to complete said contract on account of said assignments and because by so doing the labor expended was likely to be lost to him and the proceeds thereof to become due and payable to the plaintiff or to the defendant, the Manufacturers' Finance Company.

3. The plaintiff further says that in order to expedite and secure the performance and completion of said contract, and the collection of such balance as might be due from the Murray & Tregurtha Corporation, the plaintiff assigned to the defendant, the Manufacturers' Finance Company, all its claims against the Murray & Tregurtha Corporation, by an instrument in writing, a copy of
4 which is hereto annexed and marked "Exhibit B", and that simultaneously with said assignment, the defendant, the Manufacturers' Finance Company, likewise agreed by an instrument in writing, a copy of which is hereto annexed and marked "Exhibit C", to accept the same and collect the proceeds in trust for itself and the Salem Trust Company, and to deposit the said proceeds in a special account with the defendant, the International Trust Company, and that the same should be paid to whomever should be entitled to them, as determined by agreement of the parties or some court of competent jurisdiction.

4. The plaintiff says that as a further step to secure the performance and completion of said contract by the receiver, the defendant, the Manufacturers' Finance Company, the plaintiff's consent, entered into an agreement with the receiver on or about the 6th day of October, 1919, by the terms of which the receiver agreed to perform the contract, to pay himself for the labor expended, and to turn over the surplus to the parties entitled thereto and to permit them to collect it upon their own account, and that said agreement was thereafter, on or about December 17, 1919, reduced to writing by in-

strument, a copy of which is hereto annexed and marked "Exhibit D".

5. The plaintiff further says that the receiver completed the contract with the Murray & Tregurtha Corporation and that he paid himself for all moneys that were due for the work of said completion, and that he paid, or caused to be paid, to the Manufacturers' Finance Company, the balance then due, amounting to $8,634.10; that the Manufacturers' Finance Company has deposited the said moneys with the International Trust Company, which now holds them, and it brings this Bill in Equity to establish its rights to said funds and to have an order for their payment to it, and for such other and further relief as to the Court seems proper.

Wherefore the plaintiff prays:

1. That its right to said fund may be established and that the defendants may be ordered to deliver and pay the same to the plaintiff.

2. That a preliminary injunction may issue restraining
5 the defendants from withdrawing the said fund, referred to in paragraph 5 of the bill of complaint, or paying the same to any person until further order.

3. For such other and further relief as to the Court seems proper.

SALEM TRUST COMPANY. [SEAL.]
By HARRY N. WILKINS,
Treasurer,
By Its Attorneys,
HARPER & BURHOE.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

October 21, 1920.

Then personally appeared Harry N. Wilkins, the treasurer of the Salem Trust Company, and upon being duly sworn, does on oath depose and say that he has read and subscribed the foregoing bill in equity, that the allegations of fact, so far as made upon his knowledge, are true and that as to the others, he believes them to be true, before me.

[Notarial Seal.] ALFONS F. FISHER,
Notary Public.

[MEMORANDUM.—By agreement of counsel, Exhibits "A", "B", "C" and "D" referred to in the foregoing bill of complaint as annexed are omitted from this Transcript of Record. James S. Allen, Clerk.]

This bill was entered and filed in our said Court on the twenty-fifth day of October, A. D. 1920, when and where the Plaintiff appeared by Messrs. Harper and Burhoe, its attorneys, as aforesaid.

And the following was endorsed on said Bill of Complaint, to wit:

"SUFFOLK, *ss:*

Boston, 25 Oct., 1920.

Notice ordered to issue, returnable into this Court at said Boston, in the Equity Session, First Division thereof, on Friday the twenty-ninth day of October, 1920, at 10 o'clock a. m., to show cause why an injunction should not issue, as prayed for in the plaintiff's bill, with temp. restrng. order 2d prayer.

Att.: H. E. BELLEW,
Asst. Clerk."

Whereupon the following was issued by our said court, to wit:

6 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[SEAL.]

To Manufacturers' Finance Company, a corporation organized under the laws of the State of Delaware and having a usual place of business in Boston, in our said county of Suffolk, and the International Trust Company, a banking corporation organized under the laws of said Commonwealth and having an usual place of business in said Boston, respondents, Greeting:

We command you that you appear before our Superior Court, at the rules to be holden at Boston, within our County of Suffolk, on the first Monday of December next, then and there to answer to a bill of complaint exhibited against you in our said Court, in the County of Suffolk, by The Salem Trust Company, a banking corporation organized under the laws of said Commonwealth, with an usual place of business in Salem, Essex County.

And you are hereby notified to appear before some one of the Justices of this Court, at the Equity Session, First Division, in the court house in Boston, in said County of Suffolk, on Friday, the twenty-ninth day of October, A. D. 1920, at 10 o'clock, a. m., to show cause why an injunction should not issue, as prayed for in said Bill of Complaint; and in the meantime and until such hearing you the said respondents, your agents, attorneys, and counsellors and each and every of them are restrained from withdrawing the fund of $8,634.10 mentioned in paragraph 5 of the bill and to do and receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties, in the law, in that behalf provided.

Witness, John A. Aiken, Esquire, at Boston, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and twenty.

HENRY E. BELLEW,
Asst. Clerk.

Subsequently on the twenty-ninth day of October, 1920, said subpœna, notice and restraining order *was* returned into
7 court, with the following return endorsed thereon by the officer who served the same, to wit:

"SUFFOLK, *ss:*

Boston, October 26, 1920.

I this day summoned the within named respondents, each to appear and answer and also to show cause at court as within directed by delivering to A. E. Garland, Esq., assistant secretary and officer in charge of the business of the within named respondent, the International Trust Company, and by delivering to George L. Bitty, Esq., assistant treasurer and officer in charge of the business of the within named Manufacturers' Finance Company, each an attested copy of this precept.

EDMUND P. KELLY,
Deputy Sheriff."

Service & Travel.....	2.10
Copies	2.00
	$4.10

On said twenty-ninth day of October, 1920, the following appearances in writing were entered, to wit:

SUFFOLK, *ss:*

Superior Court, Sitting —— —, 19—.

No. 18272. Eq.

SALEM TRUST CO., Plff.

v.

MFRS. FINANCE CO. & Others, Dfts.

Appearance.

In the above action we appear for the defendant Manufacturers' Finance Company.

STOREY, THORNDIKE, PALMER & DODGE.
735 Exchange Bldg.

SUFFOLK, *ss:*

Superior Court, Sitting —— —, 19—.

No. 18272. Equity.

SALEM TRUST CO., Plff.,

v.

MFG. FINANCE CO. & Another, Deft-.

Appearance.

In the above action I appear for International Trust Co.

T. F. MEGAN,
45 Milk St.

Afterward, to wit: on the sixth day of December, 1920, said defendant, International Trust Company, filed its sworn answer as follows, to wit:

8 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

In Equity.

SALEM TRUST COMPANY

vs.

MANUFACTURERS' FINANCE COMPANY et al.

Answer of Defendant International Trust Company.

Now comes the defendant, International Trust Company, and in answer to said bill as follows:

(1) The defendant neither admits nor denies the allegations set forth in paragraph one of the bill, but leaves the plaintiff to prove the same.

(2) The defendant neither admits nor denies the allegations set forth in paragraph two of the bill, but leaves the plaintiff to prove the same.

(3) The defendant neither admits nor denies the allegations set forth in paragraph three of the bill, but leaves the plaintiff to prove the same.

(4) The defendant neither admits nor denies the allegations set forth in paragraph four of the bill, but leaves the plaintiff to prove the same.

(5) In answer to paragraph five of the bill, the defendant says that the defendant, Manufacturers' Finance Company has had a deposit in the International Trust Company standing in the name of Manufacturers' Finance Company, Trustee, that the above-named account has been carried in the International Trust Company since July 21, 1920, that at the date of the service of the subpœna in this action upon your defendant there was on deposit to the credit of the Manufacturers' Finance Company, Trustee, in this account, the sum of seven thousand nine hundred and sixty three dollars and thirty-six cents ($7,963.36); that with reference to the other allegations set forth in said paragraph five of the plaintiffs' bill the defendant has no knowledge and leaves it to the plaintiff to prove same.

INTERNATIONAL TRUST COMPANY,
By Attorney, THOMAS F. MEGAN.

9 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, Mass., December 6, 1920.

Then personally appeared before me A. Edward Garland, Assistant Secretary of the defendant, International Trust Company, and made oath that the answer to paragraph five of the plaintiff's bill of complaint as heretofore set forth is true.

Before me,

THOMAS F. MEGAN,
Justice of the Peace.

My Commission expires August 18, 1927.

Subsequently on the eighteenth day of December, 1920, the following petition for removal of this suit to the District Court of the United States for the District of Massachusetts, was filed, to wit:

SUFFOLK, *ss:*

In the Supreme Court.

SALEM TRUST COMPANY

v.

MANUFACTURERS' FINANCE COMPANY and INTERNATIONAL TRUST COMPANY.

Petition of Manufacturers' Finance Company for the Removal of the Above Case to the District Court of the United States for the District of Massachusetts.

To the Honorable the Justices of the Superior Court for said County:

Your petitioner respectfully shows to this Honorable Court that the matter in dispute in the above-entitled suit exceeds the sum or value of three thousand dollars ($3,000) exclusive of interest and

costs; that the International Trust Company is not a necessary party to the said suit but is a mere nominal party being only a stakeholder and without any interest whatever in the result; that the controversy in said suit is, and at the time of the commencement of the suit was, entirely between citizens of different states, to wit, your petitioner and the Salem Trust Company; that your petitioner, defendant in the above-entitled suit, was at the time of the commencement of the said suit and still is a corporation duly organized under the laws of the State of Delaware and is a citizen of the said State having its principal place of business in the
10 City of Baltimore in the State of Maryland, and that the Salem Trust Company, plaintiff in the above-entitled suit, was then and still is a corporation organized under the laws of the Commonwealth of Massachusetts and a citizen of said Commonwealth.

And your petitioner herewith presents a bond with sufficient surety for its entering in the District Court of the United States for the District of Massachusetts within thirty days from the date of filing this petition a certified copy of the record in the above-entitled suit and for paying all costs that may be awarded by said District Court if said Court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein except to make an order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said District Court of the United States for the District of Massachusetts.

MANFRS. FINANCE CO.,
By GEO. I. DITTY,
Asst. Treas.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys.

I, George I. Ditty, on oath depose and say that I am the assistant treasurer of Manufacturers Finance Company, the above named petitioner; that I have read the foregoing petition and that the facts therein alleged are true.

GEO. I. DITTY.

Subscribed and sworn to before me this second day of December, 1920.

[Notarial Seal.] ASA S. ALLEN,
Notary Public.

My Commission expires Dec. 3, 1926.

Attached to the foregoing Petition is the following Affidavit, to wit:

11 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 18272. Eq.

SALEM TRUST CO., Plff.,

v.

MANFGRS. FINANCE CO., Deft.

Affidavit of Notice of Motion.

I, Charles F. Choate 3d (Attorney in behalf of) the above named defendant make oath that on the seventeenth day of December, A. D. 1920, I gave notice in writing to the plaintiff in the above entitled action that I should make a motion in the Equity Session, First Division of said court, at Boston, on Friday, the twenty-fourth day of December, A. D. 1920, at 10 o'clock, in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to H. V. Harper, Esq., 60 State Street, Boston. CHARLES F. CHOATE, 3d.

Boston, December 17, 1920.

Subscribed and sworn to before me,
GEORGE A. SCHEELE,
Notary Public.

Attach this affidavit to the motion.

Also on said eighteenth day of December, 1920, the following Affidavit of Service of Notice was filed, to wit:

16th December, 1920.

A. V. Harper, Esq., Attorney for Salem Trust Company, 60 State Street, Boston, Mass.:

DEAR SIR:

You are hereby notified that in the case of Salem Trust Company v. Manufacturers Finance Company entered in the Suffolk County Superior Court on the first Monday of this month the defendant will file tomorrow a petition and bond for the removal of said case to the District Court of the United States for the District of Massachusetts.

Yours truly,
STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Manufacturers Finance Company.

12 COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss:

December 16, 1920.

Then personally appeared Hawley K. Rising of Storey, Thorndike, Palmer & Dodge, attorneys for the above-named defendant, and made oath that on December 16, 1920, he served a notice on the Salem Trust Company, of which the foregoing is a true copy, by leaving the same at the office of A. V. Harper, Esq., 60 State Street, Boston, attorney for said company, before me,

ROBERT G. DODGE,
Notary Public.

And on said eighteenth day of December, 1920, the following Bond, with surety approved by the court, was filed, to wit:

Removal Bond.

Know All Men By These Presents that Manufacturers Finance Company, a corporation duly organized under the laws of Delaware and having its principal place of business in Baltimore in the State of Maryland, as principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to transact business in the Commonwealth of Massachusetts and having a usual place of business in Boston in said Commonwealth, as surety, are held and firmly bound unto the Salem Trust Company, a corporation duly organized under the laws of said Commonwealth in the sum of five hundred dollars ($500) for the payment of which well and truly to be made unto the said Salem Trust Company we bind ourself and our successors jointly and severally and firmly by these presents; upon condition nevertheless that,

Whereas the above named Salem Trust Company has heretofore brought a suit of civil nature in the Superior Court for the County of Suffolk and Commonwealth of Massachusetts against the said Manufacturers Finance Company and another, and whereas the said Manufacturers Finance Company simultaneously with the filing of this bond intends to file its petition in the said suit in said Superior Court for the removal of said suit into the District Court
13 of the United States for the District of Massachusetts, according to the provisions of the act of Congress in such cases made and provided;

Now, therefore, the condition of this obligation is such that if the said petitioner, Manufacturers Finance Company, shall enter in the said District Court within thirty days from the date of filing said petition a certified copy of the record in said suit and shall pay all costs that may be awarded by the said District Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in

such suit, if special bail was originally requested therein, then this obligation shall be void but shall otherwise remain in full force and virtue.

In Witness Whereof the said Manufacturers Finance Company and the said American Surety Company of New York have caused these presents to be signed and their respective corporate seals to be hereto affixed by their duly authorized officers this sixth day of December, 1920.

[SEAL.] MANUFACTURERS' FINANCE CO.,
By E. C. EVANS,
Treasurer.

Attest:
M. S. FORNE,
Secretary.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By FRED L. ROBERTS,
Resident Vice-President.

Attest:
GEORGE F. FELLOWS,
Resident Assistant Secretary.

And the following was endorsed on said Bond for removal, to wit:

"SUFFOLK, *ss:*

Boston, Jan. 4, 1921.

Within Bond is accepted by the Court.

WAIT, *J.*

Attest:
H. E. BELLEW,
Asst. Clerk."

And the following was endorsed on said Petition for Removal, to wit:

"SUFFOLK, *ss:*

Boston, Jan. 4, 1921.

Petition and Bond accepted by the Court, after hearing.

WAIT, *J.*

Attest:
H. E. BELLEW,
Asst. Clerk."

14 And now on this eighth day of January, A. D. 1921, the above-entitled action is still pending, the time for exceptions or appeal not having expired.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this eighth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] FRANCIS A. CAMPBELL,
Clerk.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 18272. Equity.

THE SALEM TRUST COMPANY

vs.

MANUFACTURERS' FINANCE COMPANY and Another.

Docket Entries.

Counsel for Complainant:

Harper & Burhoe.

Counsel for Respondent:

1920, Oct. 29, Storey, Thorndike, Palmer & Dodge for Manufacturers' Finance Company.
1920, Oct. 29, T. F. Moran for International Trust Company.

Bill Entered October 25, 1920.—Notice ordered to show cause &c. returnable Friday, October 29, 1920, at 10 A. M., with restraining order under 2d prayer. Subpœna returnable December. Notice and restraining order issued.
October 29.—Subpœna, notice and restraining order returned with service (1).
December 6.—Answer of International Trust Company (2).
December 18.—Petition for Removal to District Court of United States (3). Affidavit of Notice (4). Removal Bond (5).
January 4, 1921.—Petition and Bond accepted by the Court.
January 8, 1921.—Copies prepared for District Court of the United States for the District of Massachusetts.
Copy.

(January 8th, A. D., 1921.)

Attest:
FRANCIS A. CAMPBELL,
Clerk.

15 On the said tenth day of January an answer was filed by the Manufacturers Finance Company.
At the same term, to wit, January 27, 1921, the following Motion to Remand was filed:

Motion to Remand.

[Filed January 25, 1921.]

Now comes the plaintiff by its attorneys, Harper & Burhoe, and appearing specially for the purposes of this motion only, and for no other purpose, and expressly denying that this court has jurisdiction of this cause and the plaintiff therein, respectfully moves the court to remand this cause to the Superior Court of Suffolk County, State of Massachusetts, from whence it was removed, for the reason that the International Trust Company, one of the defendants in this action, is a necessary party to said suit and was at the time of the commencement of said suit and still is a corporation organized and existing under the laws of the State of Massachusetts and a citizen of said State; that your plaintiff was at the time of the commencement of said suit and still is also a corporation organized and existing under the laws of said State of Massachusetts and is a citizen of said State; and that therefore since both the plaintiff and one of the defendants are citizens of the same State and not of different States, said suit has been improperly removed from said Superior Court of Massachusetts to this court.

And your plaintiff further prays that this court shall make such order as to costs as shall be just.

Plaintiff, SALEM TRUST COMPANY.
By Its Attorneys, HARPER & BURHOE.

Also at the same term, to wit, January 25, 1921, this cause came on to be heard on the foregoing motion to remand, and it was ordered by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, that the said motion to remand be denied.

This cause was thence continued to the present March
16 Term, A. D. 1921, when, to wit, April 11, 1921, the following Motion to Amend Answer and Amended Answer is filed and allowed:

Motion to Amend Answer and Amended Answer.

[Filed and Allowed April 11, 1921.]

The defendant Manufacturers' Finance Company moves to amend its answer heretofore filed by striking out the same and substituting therefor the following amended answer.

STOREY, THORNDIKE, PALMER & DODGE.
Attorneys for Manufacturers' Finance Company.

Amended Answer.

This defendant admits on information and belief that the plaintiff had loaned to the Nelson Blower & Furnace Company the sum of

$40,000 as alleged in paragraph 1 of the bill, and that by way of substitution of collateral the Nelson Blower & Furnace Company executed and delivered to the plaintiff the document of which a copy is annexed to the bill and marked "Exhibit A". And this defendant admits that on July 15, 1919, the Nelson Blower & Furnace Company assigned to this defendant certain sums of money due or to become due from said Murray & Tregurtha Corporation and that said assignment was made without any disclosure to it of the aforesaid document, Exhibit A, of the existence of which document or of any alleged assignment by the Nelson Blower & Furnace Company to the plaintiff this defendant was entirely ignorant until long after it had paid full value for the aforesaid assignment to it. This defendant admits the allegations of paragraph 1 of the bill with reference to the receivership of the Nelson Blower & Furnace Company and the conduct of its business by the receiver. The defendant denies the remaining allegations of said paragraph.

2. This defendant is ignorant as to when the plaintiff learned of the aforesaid assignment to this defendant, but admits that shortly after the time of said receivership both parties claimed the proceeds then due or thereafter to become due from the said Murray & Tregurtha Corporation. This defendant denies that the accounts were assigned to the plaintiff, but admits that the accounts claimed by it were as described in paragraph 2 of the bill. And this defendant admits that at the time of the receivership the contract for the construction of certain engines referred to in said paragraph was only partially completed, and this defendant denies the remaining allegations of said paragraph 2.

17

3. This defendant admits the allegations of paragraph 3 of the bill except in so far as they are allegations concerning the substance and legal effect of the instrument in writing, a copy of which is annexed to the bill and marked "Exhibit C," and as to such allegations this defendant begs leave to refer to said document as setting forth the exact agreement of said parties.

4. This defendant admits that with the plaintiff's consent it made an arrangement with the receiver, the terms of which are set forth in the contract, of which a copy is annexed to the bill marked "Exhibit D," but the defendant says that the said contract was not executed until February 24, 1920, and the defendant denies the remaining allegations of said paragraph 4.

5. This defendant denies that the receiver completed the contract with the Murray & Tregurtha Corporation. It admits the remaining allegations of paragraph 5 of the bill, except that it says that from the amount originally deposited with the International Trust Company certain proper expenses have been paid so that the amount on deposit when this suit was begun was $7,963.36.

STOREY, THORNDIKE, PALMER & DODGE,

Solicitors for Manufacturers' Finance Company.

ANDERSON, *J.*:

Allowed April 11, 1921, plaintiff assenting.

On the sixth day of May, A. D. 1921, the following Agreed Facts are filed, by leave of court, as of April 11, 1921:

Agreed Facts.

[Filed by Leave of Court on May 6, 1921, as of April 11, 1921.]

It is agreed for the purpose of hearing and determining this cas in the District Court of the United States, District of Massachusetts, and on appeal to the Circuit Court of Appeals, that the follow-
18 ing facts are true so far as material. The court may draw all reasonable and proper inferences from the facts herein stated. Either party may offer and introduce any material and competent testimony not inconsistent herewith.

The plaintiff is a corporation under the laws of Massachusetts and is a citizen of Massachusetts, having its usual place of business in Salem. The defendant Manufacturers' Finance Company (hereinafter called the Finance Company) is a corporation organized under the laws of Delaware, and a citizen of said State, having a usual place of business in Boston. The defendant International Trust Company is a Massachusetts corporation, and a citizen of said Commonwealth.

On May 15, 1919, the Nelson Blower & Furnace Company (hereinafter called the Nelson Company), a Massachusetts corporation, having its principal place of business in Boston, assigned to the plaintiff, for valid consideration, the indebtedness due and to become due said Nelson Company to the amount of forty-five thousand (45,000) dollars from the Murray & Tregurtha Corporation, also incorporated and doing business in Massachusetts, under a contract whereby said Nelson Company was to construct for said Murray & Tregurtha Corporation thirty marine engines at twenty-five hundred (2,500) dollars each.

On July 15, 1919, said Nelson Company assigned to the defendant Finance Company, for valid consideration, the same indebtedness to the amount of forty thousand (40,000) dollars. On September 20, 1919, said Nelson Company assigned to the defendant Finance Company, for valid consideration, the same indebtedness to the further amount of ten thousand (10,000) dollars.

On or about last-named date, said Finance Company, having no knowledge of the assignment to the plaintiff above referred to, duly notified the Murray & Tregurtha Corporation of said assignments to the Finance Company. It was not until a few days later that the Murray & Tregurtha Corporation had any knowledge of the aforesaid assignment to the plaintiff either from the plaintiff or through any other source.

The amount advanced by the Finance Company as consideration for its assignments, no part of which has been repaid, exceeds
19 said amount on deposit in the International Trust Company.

More than that amount is still due, also, upon the note of said Nelson Company now held by the plaintiff as part collateral for which the above mentioned assignment to it was made.

On September 26, 1919, said Nelson Company was placed in the hands of a receiver by a decree of this court in equitable proceedings, and on or about said date the plaintiff and the defendant Finance Company each first learned of the assignment to the other. When the receiver took possession, the work of constructing the engines for the Murray & Tregurtha Corporation, as aforesaid, was in process, but was unfinished, and the receiver consented to go on with it only on the understanding that his expenses in connection therewith should be paid in priority to the assignments.

On October 6, 1919, the plaintiff and the Finance Company entered into an agreement, a copy of which is hereto annexed and marked "Exhibit No. 1," and on the same day the plaintiff assigned its interest in the indebtedness under its said payment of May 16, 1919, to the Finance Company as trustee under said agreement. The receiver thereafter performed most of the work required to complete the contract aforesaid between the Nelson Company and the Murray & Tregurtha Corporation and received therefor the sum of sixty thousand (60,000) dollars, of which he retained fifty-one thousand three hundred and sixty-five dollars and ninety cents ($51,365.90) to reimburse him for his expenses in connection therewith, and turned over the balance, amounting to eight thousand six hundred and thirty-four dollars and ten cents ($8,634.10), to said Finance Company as trustee under said agreement (Exhibit No. 1), which it deposited in said International Trust Company pursuant to the terms of said agreement. The work under the contract with the receiver was not fully completed, and five thousand (5,000) dollars was therefore withheld from the contract price.

A certain sum has since been withdrawn on account of the expenses of the trustee, referred to in section 3 of Exhibit 1, and a certain amount of interest has been allowed by the Trust Company, so that at the time when this suit was brought there was on deposit in said Trust Company, in the name of the Manufacturers' Finance
20 Company as trustee, seven thousand nine hundred and sixty-three dollars and thirty-six cents ($7,963.36), which is the entire amount available for the satisfaction of the plaintiff's and defendant's respective assignments.

The only question, aside from that of jurisdiction, raised by the pleadings on these agreed facts is: Which of the two parties, the Salem Trust Company or the Manufacturers' Finance Company, is entitled to said fund?

ASA P. FRENCH,
ARTHUR V. HARPER,
HARPER & BURHOE,
For Plaintiff.
ROBERT G. DODGE,
(P.,)
For Defendant Manufacturers' Finance Company.
THOMAS P. MEGAN,
Attorney for International Trust Company.

May 9, 1921.

This may be filed as of April 11, 1921.

G. W. ANDERSON,
Circuit Judge.

EXHIBIT No. 1.

This Agreement made this 6th day of October, 1919, by and between Manufacturers' Finance Company, a Delaware corporation, having an office in Boston, Massachusetts, first party, and Salem Trust Company, a Massachusetts corporation, having an office in Salem, Massachusetts, a second party,

Witnesseth that

Whereas the Murray & Tregurtha Corporation (hereinafter called the Corporation) and the Nelson Blower & Furnace Company (hereinafter called Nelson Company), have entered into a contract whereby said Corporation has delivered certain raw materials to the Nelson Company which the Nelson Company is to fashion into certain machinery under a compensation to be paid by the Corporation to the Nelson Company amounting as the parties hereto believe, to the sum of seventy-five thousand dollars ($75,000) or thereabouts, and

Whereas the Nelson Company has assigned to the first party
21 accounts receivable of the Nelson Company due and to become due from the Corporation under said contract amounting to fifty thousand dollars ($50,000) and the first party is now the owner of said accounts receivable under said assignment, and

Whereas the Nelson Company has assigned to the second party as pledgee accounts receivable due and to become due to the Nelson Company by the Corporation under said contract amounting to forty-five thousand dollars ($45,000) and the second party is now the owner of said accounts receivable so assigned, and

Whereas the Nelson Company is now in the hands of a Receiver, and has not completed the work under its aforesaid contract with the Corporation, and

Whereas the parties hereto cannot agree as to which party hereto has priority under its respective assignment to the accounts accrued and to secure under the aforesaid contract between the Nelson Company and the Corporation, and it is deemed expedient by the parties hereto that, in order to facilitate the collection of said assigned accounts due and to become due, all said assigned accounts shall be collected by the first party in trust for the benefit of the respective owner or owners thereof, and that all questions as to such ownership shall hereafter be agreed upon by the parties hereto or be decided by some Court of competent jurisdiction, and

Whereas the parties hereto have given a joint written notice to the Nelson Company and to the Corporation to pay such accounts assigned to the parties hereto, as aforesaid, to the first party:

Now, Therefore, for and in consideration of one dollar to each in hand paid by the respective parties hereto, the receipt whereof

is hereby acknowledged, and in consideration of these presents, the parties hereto agree with each other as follows:

1. The first party shall collect all said assigned accounts receivable of the Nelson Company in the name of the first party, but in trust, for such of the parties hereto as shall hereinafter be agreed upon by the parties hereto or found by some court of competent jurisdiction to be respectively entitled thereto. The first party shall deposit all of the proceeds of such assigned accounts receivable in the International Trust Company of Boston in a special ac-
22 count in the name of the first party as Trustee, there to remain subject to the terms hereof and for the purposes hereof.

2. The first party shall have full power to collect all of such assigned accounts receivable, and for all such purposes shall hold the legal title to the same, with full power to bring any suit, thereon in its own name, and for the purposes hereof the parties hereto have, by a separate assignment of even date herewith, assigned all their respective right, title and interest in and to each and all assigned accounts receivable of said Nelson Company to the first party, but in trust, and subject to the terms hereof.

3. The first party shall only be entitled to retain from the funds representing the collection of such accounts receivable all of its cash expenses sustained in making such collection.

4. The first party shall give reports on demand of all collections to the second party.

5. If the Nelson Company or the Corporation shall pay to the second party any sum or property on account of said assigned accounts, the second party agrees to forthwith turn the same over to the first party to be held by it in trust under the terms hereof.

6. If the parties hereto shall not be able to agree upon the ownership of the proceeds of any of such accounts, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time.

In Witness Whereof the parties hereto have caused these presents to be executed in duplicate and their corporate names to be hereto affixed by their respective officers, hereunto duly authorized, on the day and year first above written.

MANUFACTURERS' FINANCE COMPANY,
By A. W. BROOKS,
Vice-President.
SALEM TRUST COMPANY,
By M. W. BARBER,
President.

This cause is thereupon set down for hearing and fully heard by the court on April 11, 1921, the Honorable George W. An-

23 derson, Circuit Judge as aforesaid, sitting, and on the twelfth day of said April a memorandum of decision is announced.

On the sixth day of May, A. D. 1921, the following Final Decree is entered:

Final Decree.

May 6, 1921.

ANDERSON, *J.:*

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it appearing that the defendant Manufacturers' Finance Company is as a matter of law upon the agreed facts entitled to the sum on deposit in the International Trust Company, it is ordered, adjudged and decreed that the bill be dismissed without costs.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

Agreed to as to form.
ASA P. FRENCH.
R. G. DODGE,
(P.)
THOMAS F. MEGAN.

From the foregoing final decree the plaintiff claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and, bond being waived, said appeal is allowed accordingly.

Plaintiff's Requests for Rulings and Findings.

[Filed April 11, 1921.]

Now comes the plaintiff in the above-entitled cause, and requests the court to rule and find as follows:

1. To rule that, upon all the evidence, the plaintiff is entitled to the relief prayed for in its bill.

2. To find that the settled law of this Commonwealth, as announced in the decisions of the Supreme Judicial Court, is that, as between conflicting assignments of the same chose in action, the earlier in point of time is entitled to priority, whether notice of such assignment has been given to the debtor or not.

3. To rule that this announcement of the law by this Commonwealth through its highest tribunal (as well as inferentially
24 by its legislature, R. L. c. 173, sec. 4) has created a right affecting property which all the world is justified in assuming will be protected not only in the courts of the State, but by the Federal courts sitting in this District

4. To rule that the plaintiff's assignment being prior in point of time to that of the Manufacturers' Finance Company, the plaintiff

is entitled to recover the amount on deposit in the International Trust Company by virtue of the provisions of the agreement (Exhibit H) annexed to the agreed facts.

5. To rule that the Nelson Blower & Furnace Company, having sold all its interest to the extent of $45,000 in the payments due and to become due it under its contract (Exhibit B) with the Murray & Tregurtha Corporation to build thirty marine engines, had no interest therein left to assign to the Manufacturers' Finance Company on July 21 and September 20, 1919, unless it was the excess, if any, of the amount due or to become due said Nelson Company over and above $45,000.

6. To rule that, upon all the evidence, the plaintiff's and defendant Manufacturers' Finance Company's rights to the amount on deposit in the International Trust Company are determined by the agreement (Exhibit H), and that, in view of the recitals in said agreement and the letter (Exhibit I), neither can now *can* be heard to say that the Nelson Blower & Furnace Company did not make an assignment operative to pass title in said amount on deposit to that one of the two claimants whose assignment has priority of right over the others.

7. To rule that, upon all the evidence, the defendant International Trust Company is an indispensable party to this suit, and that, it being a resident and citizen of Massachusetts, this court has no jurisdiction of this cause.

Memorandum of Decision.

April 12, 1921.

ANDERSON, *J.:*

This case falls within a very narrow compass. The single question is, whether, as between two successive assignees of a chose in action, the second assignee having given notice to the debtor before the first assignee, the second assignee has the better title. The English rule is laid down in Dearle v. Hall, 3 Russell, 1, and is contended to be the rule in the Federal Court. See In re Letherman, etc., 260 Fed. 543, 547. Methven et al. v. Staten Island L., H. & Power Co., 66 Fed. 113. Judson v. Corcoran, 17 Howard, 612, 614.

If this rule prevails in this court, there must be a decree in favor of the defendant Manufacturers' Finance Company.

The Massachusetts rule is in favor of the prior assignee. See Thayer v. Daniels, 113 Mass. 120, 131. Herman v. Connecticut Mutual Life Insurance Company, 218 Mass. 181, 185, and cases cited.

Agreeing with counsel for the Salem Trust Company, that it is exceedingly unfortunate that one rule should be adopted in the Massachusetts courts and another rule in the Federal court sitting in Massachusetts, I am constrained by my view of the authorities to

hold that the Federal rule is the English rule, and there must consequently be a decree for the Manufacturers' Finance Company. It follows that plaintiff's requests for rulings, so far as inconsistent with this result, should be denied and the plaintiff's rights fully saved.

Decree accordingly.

Plaintiff's Petition for Appeal.

[Filed May 11, 1921.]

Now comes Salem Trust Company, the plaintiff in the above-entitled cause, and feeling itself aggrieved by the final decree of this court entered on the sixth day of May, 1921, prays that an appeal may be allowed to it from said decree to the United States Circuit Court of Appeals for the First Circuit, and in connection with this petition herewith presents its assignment of errors.

SALEM TRUST COMPANY,
By Its Attorneys, ASA P. FRENCH,
HARPER & BURHOE.

26 *Appellant's Assignment of Errors.*

[Filed May 11, 1921.]

Now comes Salem Trust Company, appellant in the above-entitled cause, and, in connection with its petition for appeal, says that, in the record, proceedings, and in the final decree in said cause, manifest error has intervened to the prejudice of the appellant, to wit:

1. That the court erred in dismissing the complaint.

2. That the court erred in refusing to rule that, upon all the evidence, the plaintiff is entitled to the relief prayed for in its bill.

3. That the court erred in holding, in substance, that the Federal rule with respect to priority of claim as between successive assignees of the same non-negotiable chose in action, is the English rule, so-called; and that there must consequently be a decree for the defendant Manufacturers' Finance Company.

4. That the court erred in refusing to rule that, the assignment to the plaintiff being prior in point of time to those to the Manufacturers' Finance Company, the plaintiff is entitled to recover the amount on deposit in the defendant International Trust Company by virtue of the provisions of the agreement, Exhibit 1, annexed to the agreed facts.

5. The court erred in refusing to rule that the Nelson Blower & Furnace Company having sold all its interest, to the extent of $45,000, in payments due and to become due it under its contract

with the Murray & Tregurtha Corporation to build thirty marine engines, had no interest therein left to assign to the Manufacturers' Finance Company on July 21 and September 20, 1919, unless it was the excess, if any, of the amount due or to become due said Nelson Company over the above said $45,000.

6. That the court erred in refusing to rule that upon all the evidence the defendant International Trust Company is an indispensable party to this suit, and that, inasmuch as it is a resident and citizen of Massachusetts, the District Court acquired no jurisdiction of this cause.

27 7. That the court erred in refusing to remand said cause to the State court.

SALEM TRUST COMPANY,
By Its Attorneys, ASA P. FRENCH,
HARPER & BURHOE.

Waiver of Bond and of Court Costs by International Trust Company.

[Filed May 11, 1921.]

In the above entitled cause the defendant International Trust Company hereby waives the plaintiff's bond to secure said defendant its costs on appeal.

THOMAS F. MEGAN,
Attorney for Defendant.

Waiver of Bond and of Court Costs by Manufacturers' Finance Company.

[Filed May 11, 1921.]

In the above-entitled cause the defendant Manufacturers' Finance Company hereby waives the plaintiff's bond to secure said defendant its costs on appeal.

R. G. DODGE,
(P.,)
Attorney for Defendant.

Stipulation as to Printing Exhibits.

[Filed May 11, 1921.]

In the above-entitled cause it is hereby agreed that none of the exhibits referred to in the bill of complaint and annexed thereto shall be printed, for the reason that the exhibits therein designated "A", "B" and "D" are immaterial to the issue raised by this appeal,

and Exhibit C is printed as an exhibit attached to the agreed facts, and marked "Exhibit 1".

ASA P. FRENCH,
HARPER & BURHOE,
Attorneys for Plaintiff.

28

R. G. DODGE,
(P.,)
Attorney for Defendant Manufacturers' Finance Company.

T. F. MEGAN,
Attorney for Defendant International Trust Company.

May 6, 1921.

ANDERSON, *J.*:

Approved.

Attest:

JOHN E. GILMAN, JR.,
Deputy Clerk.

Agreement as to Record on Appeal.

[Filed May 11, 1921.]

It is hereby agreed between the parties that the following documents shall make up the record on appeal before the Circuit Court of Appeals:

1. Bill of complaint.
2. Defendants' answers.
3. Petition for removal.
4. Removal bond and order of Superior Court.
5. Motion to remand.
6. Order of District Court denying motion to remand.
7. Agreed facts and plaintiff's requests.
8. Memorandum of decision.
9. Order and decree of the District Court.
10. Petition for appeal.
11. Assignment of errors.

12. Citation on appeal.
13. Clerk's certificates.

ASA P. FRENCH,
HARPER & BURHOE,
Attorneys for Plaintiff.

R. G. DODGE,
Attorney for Defendant Manufacturers' Finance Company.

T. F. MEGAN,
Attorney for Defendant International Trust Company.

29 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Manufacturers' Finance Company, a corporation organized under the laws of the State of Delaware and having a usual place of business in Boston, Suffolk County, Massachusetts, and the International Trust Company, a banking corporation organized under the laws of the Commonwealth of Massachusetts, with a usual place of business in said Boston, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the first day of June next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein The Salem Trust Company, a banking corporation organized under the laws of the Commonwealth of Massachusetts with a usual place of business in Salem, Essex County, Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge duly assigned to hold the District Court of the United States for the District of Massachusetts, this eleventh day of May, in the year of our Lord one thousand nine hundred and twenty-one.

GEORGE W. ANDERSON,
United States Circuit Judge.

Acknowledgment of Service of Citation.

Service of the within citation is hereby acknowledged.

R. G. DODGE,
Attorney for Manufacturers' Finance Company.

T. F. MEGAN,
Attorney for International Trust Company, Defendant.

30 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing are true copies of the papers as agreed upon by the parties as being the portions of the record of said District Court to be included in the record on appeal in the cause in equity entitled, No. 1058, the Salem Trust Company, Plaintiff, v. Manufacturers' Finance Company Et Al., Defendants, in said District Court determined, together with the original Citation, with the Acknowledgment of Service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this first day of June, A. D. 1921.

[SEAL] JAMES S. ALLEN,
Clerk.

31 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1515.

THE SALEM TRUST COMPANY, Paintiff, Appellant,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Johnson, and Brown, JJ.

Opinion of the Court.

April 11, 1922.

BINGHAM, *J.:*

This is a bill in equity brought by the Salem Trust Company, a Massachusetts corporation, against the Manufacturers' Finance Company, a Delaware corporation, and the International Trust Company, a Massachusetts corporation, to establish the alleged right of the Salem Company as against the Finance Company to a sum deposited by the Finance Company with the International Trust Company.

The suit was originally brought in the Superior Court of Massachusetts, but was removed by the Finance Company to the District Court on the ground of diverse citizenship. After removal the plaintiff, the Salem Company, filed a motion to remand the cause, which was denied.

32 The case was then heard on agreed facts from which it appears that, on May 16, 1919, the Nelson Blower & Furnace Company assigned to the Salem Company the indebtedness, to the amount of $45,000, of the Murray & Tregurtha Corporation to it under a contract for the construction of certain marine engines; that, on July 15, and again on September 20, 1919, the Blower & Furnace Company assigned the same indebtedness to the defendant, the Finance Company,—on the former date to the amount of $40,000 and on the latter $10,000; that all of the assignments were for a valid consideration; that on or about September 20, 1919, the defendant, the Finance Company, having no knowledge of the assignment to the plaintiff, notified the Murray & Tregurtha Corporation of the assignment to it; that at that time the Murray & Tregurtha Corporation had no knowledge of the assignment to the plaintiff and did not learn of it until later; that on September 26, 1919, the Blower & Furnace Company was placed in the hands of a receiver who completed the contract with Murray & Tregurtha only on the understanding that his expenses should be paid in priority to the assignments; that, on October 6, 1919, the plaintiff and defendant, having learned of the assignments, entered into an agreement reciting the facts as to the assignments; that the parties were in dispute as to their respective rights, and providing that the defendant should collect the account and deposit the proceeds in the International Trust Company in a special account in the defendant's name as trustee; and that if the parties could not agree upon the ownership of the proceeds, the question should be determined in some court of competent jurisdiction upon a proceeding brought by either party; that in pursuance of this agreement the defendant collected $8,634.10, which it deposited as agreed in the International Trust Company; that after deducting the cash expenses incurred in making such collection the amount on deposit was $7,963.36, the sum in dispute.

In the court below it was held that, inasmuch as the defendant was the first to give notice of its assignment to Murray & Tregurtha, it was entitled to the fund even though its assignment was later
33 in time *to* that of the plaintiff, and a decree was entered dismissing the bill.

It is from this decree that the present appeal is taken, and the assignments of error present two questions: (1) Did the District Court err in refusing to remand the cause; and (2) in ruling that, as between two successive bona fide assignees of the same chose in action the second prevails if he was the first to give notice to the debtor.

The International Trust Company was not a necessary party defendant. It had no interest in the subject-matter litigated, but held the sum in dispute as the agent or depositary of the defendant, the Finance Company. By the sixth article of the contract the parties did not agree upon any particular court to determine the controversy between them, but left that question for determination by any court of competent jurisdiction; and as the International Trust Company was at most a nominal party only, the motion to remand was rightly denied. Walden v. Skinner, 101 U. S. 577; Barney v. Latham, 103 U. S. 205; Bacon v. Rives, 106 U. S. 99; Ex parte Nebraska, 209 U. S. 436.

We are also of the opinion that the ruling of the court below, that the assignee who first gave notice had the prior right, though the assignment to him was later in date, was correct; and that the question decided is one of general jurisprudence as to which the decisions of the highest courts of a State are not controlling Methven v. Staten Island Light & Power Co., 66 Fed. 113; and In re Leterman, Becher & Co., 260 Fed. 543, in which certiorari was denied October 20, 1919, by the Supreme Court, 250 U. S. 668, under the name of Coleman & Co. v. Tawas Co. The ruling was in conformity with the well-established rule in the Federal courts that the party who first gives notice of his assignment is to be regarded as having the greater equity. Judson v. Corcoran, 17 How. 612; Spain v. Hamilton's Administrator, 1 Wall. 604; Laclede Bank v. Schuler, 120 U. S. 511, 516; Methven v. Staten Island Light, Heat & Power Co., 66 Fed. 113; In re Leterman, Becher & Co., 260 Fed. 543; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 637-639; 5 C. J. pp. 953, 954, 955, s. 135.

34 The law of Massachusetts relating to the assignment of choses in action is the same as that of New York and the facts in the cases cited from the Second Circuit (66 Fed. 113 and 260 Fed. 543) differ in no material respect from those now before us; namely, the applicability of the State or the Federal rule and the limitations of the latter. The questions presented are therefore the same as those that were before the court in the Second Circuit, the decision of which the Supreme Court declined to review on certiorari. As these questions were definitely presented in the certiorari proceeding and were of general importance in that their decision by the Court of Appeals in the Second Circuit involved a conclusion at variance with the law of New York as well as with that of many other states, the action of the Supreme Court in declining to review the decision is hardly conceivable unless it was satisfied the decision was right.

The decree of the District Court is affirmed, with costs to the Manufacturers' Finance Company, appellee, in this court.

BROWN, *J.*, Dissenting:

The case presents a question of priority of the rights of successive assignees of sums due or to become due upon a contract for the construction of marine engines. The debtor has discharged its obligation by payment, and by agreement of the assignees the fund is held until decision upon the conflicting claims of the two assignees.

It is conceded that under the law of Massachusetts the fund belongs to the Salem Trust Company, the first assignee. The Manufacturers' Finance Company, the second assignee, claims that the law of Massachusetts is inapplicable, and that the rights of the parties are to be decided upon what is called "the law of the Federal Courts" on a question of general jurisprudence.

Our first inquiry is whether the case is controlled by the law of Massachusetts.

The contract which created the debt was a Massachusetts contract, between two Massachusetts corporations. Under this contract the Murray & Tregurtha corporation was to pay $2,500 each for

35 thirty marine engines. The Nelson Blower Company was to construct the engines.

On May 16, 1919, the Nelson Company assigned the indebtedness due and to become due on said contract, to the amount of $45,000, to the Salem Trust Company, a Massachusetts corporation. If valid, this assignment covers the entire fund in controversy.

As these transactions were all between citizens of Massachusetts, the settled law of that state determined, as between them, the obligations and rights of the three parties—the debtor, the assignor and the assignee. The Massachusetts decisions establish the rule that in the absence of estoppel the rights of a first assignee of a chose in action will prevail against the rights of a subsequent assignee, regardless of notice to the debtor or obligor. Thayer v. Daniels, 113 Mass. 129, 131; Putnam v. Story, 132 Mass. 205; Herman v. Conn. Mut. Life Ins. Co., 218 Mass. 181, 186; Rabinowitz v. Peoples National Bank, 235 Mass. 102, 104.

After the rights of these citizens of Massachusetts had become fixed under the law of that state, the assignor, the Nelson Company, on July 15, 1919, assigned the same indebtedness to the defendant, Manufacturers' Finance Company, a corporation organized under the laws of Delaware, but having a usual place of business in Boston, Massachusetts.

The different citizenship of the second assignee is not enough to avoid the conclusion that the second assignment, like the first, was a contract made and to be enforced in Massachusetts, and subject to the laws of that state.

The jurisdiction which a state possesses over property within its borders extends alike to tangible and intangible property. Pennington v. Fourth National Bank, 243 U. S. 269. A vested right of action is property in the same sense in which tangible things are property: Prichard v. Norton, 106 U. S. 124, 132.

"The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect
36 its validity, construction, discharge and enforcement." Von Hoffman v. City of Quincy, 4 Wall. 535, 550; Brine v. Insurance Co., 96 U. S. 627, 634-5-7-9; Halsbury's Laws of England, Vol. 4, Sec. 781, p. 356.

No reason is apparent why the second assignment is not subject to that rule, or why the law of Massachusetts relating to assignments of legal choses in action does not establish a rule of property. See 19 Yale Law Journal, 258, 260-1.

Moreover, by a statute of Massachusetts, R. L. c. 173, Sec. 4, the assignee of a legal chose in action assigned in writing has a legal right of action in his own name. He need not ask relief in equity against the debtor. This statute, unlike English statutes relating to the assignments of legal choses in action, does not require notice to the debtor. See Halsbury's Laws of Eng. Vol. 4, p. 367, note (*h*).

The rule that authoritative state decisions rendered by a state

court before the rights of the parties accrued and became fixed are presumed to be known to the parties, and form part of the contract, seems as applicable to written assignments of book accounts, or accounts receivable, as to conveyances or written instruments between private parties evidencing a transfer of real property or tangible personal property. As the state has like control over tangible and intangible property within its jurisdiction (Pennington v. Fourth Nat. Bank, 243 U. S. 269), the rule seems equally applicable to tangible and intangible property. Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, 372.

Whether we adopt the theory that an assignment of a legal chose in action is a complete transfer of the assignor's legal right, or the theory that the assignee gets only an equitable title recognized by and enforceable in a court of law through an action in the name of the assignor or in his own name, it seems equally necessary to give effect to local decisions which have become rules of property.

It would seem sufficient for the purposes of this case to hold that the settled law of Massachusetts forms part of and controls these contracts of assignment. A foreign corporation which is
37 permitted to maintain a usual place of business in the state of Massachusetts for the transaction of local business, certainly has no right to preferential treatment as compared with resident citizens of Massachusetts, or to complain that it is subject to the same law. Horn Silver Mining Co. v. New York, 143 U. S. 305, 315; Shaffer v. Carter, 252 U. S. 37, 53. The consent of the state to its conduct of business therein of an intrastate character implies the condition that it shall assent to and be governed by the laws affecting the mode of transfer of property which govern its own citizens. That the state has assented to the making of contracts by foreign corporations which shall become superior to those of its own citizens and prejudicial to their rights of property is not to be assumed. The different citizenship of the parties does not give to the contract and interstate character or create a right to question the local policy of a state in respect to the transfer of property, tangible or intangible. Pickens v. Merriam, 274 Fed., 1, 7, 8.

If we adopt the view that under the Massachusetts decisions the Salem Trust Company, through an assignment in writing of a legal chose in action, acquired a statutory right of action in its own name, and that the assignor's legal right of action was transferred to the plaintiff, it follows, the assignor having parted with his interest by the first assignment, that the second assignee could take nothing. The second document of assignment was, therefore, as ineffective under the law of Massachusetts as any deed of property which the grantor did not own. In that view of the case we should conclude that there was, in substance, but one assignment,—the first. There would then remain no question of "equitable priority" or of "equitable preference," as these terms are generally used. This question of priority arises between merely equitable interests, and not between an equitable interest and a legal title. Pomeroy's Eq. Jur. 3d Ed., Secs. 677, 679, 1277, 1273; Judson v. Corcoran, 17 How. 612, 614.

Upon the question whether a statutory provision authorizing an assignee to sue at law in his own name betters his position and changes his right into a legal title, interest or ownership,
38 there seem to be contrary opinions. See Pomeroy's Eq. Sec. 137; In re Westerton, 1919, 2 Chan. Div. L. R. p. 104; Williston on Contracts, Vol. 1, Sec. 435, 446*a*, 447; Marsh v. Garney, 69 N. H. 236.

Assuming, therefore, that, regardless of the Massachusetts statute and decisions that we have cited, we have a question of equitable preference, we may inquire whether the second assignee can establish his right to such preference.

The Manufacturers' Finance Company, the second assignee, rests its claim to equitable priority upon the fact that it was first to give notice of its assignment to the debtor, the Murray & Tregurtha Company. We are asked to accept and apply the following rule:

"Between two successive bona fide assignees of the same chose in action, the second will prevail if he was first to give notice to the debtor."

It will be observed that this rule, as stated by Lord Macnaghten in Ward v. Duncombe, 1893, A. C. 369, 390, "gives the go-by to all considerations founded upon the conduct of the parties." This rule, which is commonly, and it seems erroneously, styled the rule of Dearle v. Hall, 3 Russ. 1, might more properly be called the rule of Foster v. Cockerell, 3 Cl. & F. 456. It was applied in that case between incumbrancers of an equitable interest in trust funds.

Both Dearle v. Hall and Foster v. Cockerell are critically examined by Lord Macnaghten in Ward v. Duncombe, who said of the rule declared in Foster v. Cockerell:

"Priority in such a case depends simply and solely upon priority of notice."

This shifting from a consideration of the conduct of both parties, and of the effect that the conduct of one might have had upon the other, to a consideration of the single question of priority of notice, was so radical a departure from the ordinary operations of the conscience of a chancellor as to evoke the remark from
39 Lord Macnaghten that the court in Foster v. Cockerell, "has gone perilously near legislating."

It is a general principle in courts of equity that, where both parties claim by equitable titles, the one who is prior in point of time is deemed the better in right. In protecting an innocent purchaser holding the legal title against one who has the prior equity, a court of equity can act only on the conscience of a party. If he has nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Boone v. Chiles, 10 Pet. 177, 210. But the question of conscience is as important between equitable titles as between a legal and an equitable title. The doctrine of equitable estoppel and

the principles of negligence involve a consideration of the effect of conduct, whether action or inaction, upon the conduct of others.

When we disregard the question whether the failure of the first assignee to give notice has in fact misled or prejudiced the second assignee, and the further question whether the conduct of the obligor has been affected by the fact that notice of the second assignment preceded notice of the first assignment, there seems to be left no question of conscience and no established principle of equity which requires the reversal of the ordinary rule that he who is prior in time is prior in right.

In this case the statement of agreed facts fails to show that the second assignee made inquiry of the debtor before making its loan and taking its assignment. There is nothing which shows that it relied upon any knowledge except that furnished by the assignor, or that the failure of the first assignee to give notice influenced its conduct or that of the debtor.

I am unable to agree that the case of Dearle v. Hall, when stripped of its consideration of the important fact that the second assignee had made inquiry of the trustee and found no incumbrance before he made his loan, relying upon an apparent title, has been approved by the Supreme Court of the United States, in the cases cited by the defendant.

Judson v. Corcoran, 17 How. 612, 615, in dicta upon which defendant relies, makes express reference to the element of inquiry by the second assignee:

"There may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, * * * would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy.

"The cases of Dearle v. Hall and Loveridge v. Cooper * * * established the doctrine to the foregoing effect in England;"

In Spain v. Hamilton, 1 Wall. 604, 624, the junior transferees made inquiries. The defendant quotes from page 624:

"In order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

This relates to perfecting title not against a subsequent assignee but against the debtor. The expression "for otherwise a priority of right may be obtained by a subsequent assignee" is wholly insufficient as an approval of a rule that he may obtain it merely by giving first notice after taking the assignment.

In Baker v. Wood, 157 U. S. 212, 215, Judson v. Corcoran is cited in support of the rule of estoppel.

"We know of no case holding that a man is estopped by silence as against the public, or any particular person with whom he has no fiduciary relation."

Wiser v. Lawlor, 189 U. S. 260, 272. See also Greey v. Dockendorff, 231 U. S. 513, 516.

The discussion of Dearle v. Hall and of Foster v. Cockerell (3 Cl. & Fin. 456) by the House of Lords, in Ward v. Duncombe, 1893, App. C. 369, should be read before extending the doctrine of those cases which relate to the assignments of equitable interests to a case relating to the assignment of legal choses of action in ac-
41 cordance with the statutory law of a state. Lord Macnaghten said (p. 391):

"The learned counsel for the appellants invited your Lordships to define exactly the principle on which the doctrine of notice as established by the rule in Dearle v. Hall depends. Speaking for myself, I think that would be a very hard task. I am not sure that the doctrine rests upon any very satisfactory principle. I am not sure that it has not been established at the expense of principles at least as important as any of those to which it has been referred.

The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in Shropshire Union Railways and Canal Company v. The Queen (4): 'A pre-existing equitable title,' said Lord Cairns, 'may be defeated by a supervening legal title obtained by transfer'—he was there speaking of an equitable title to shares. Then he goes on: 'And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.'

"In defence of the rule in Dearle v. Hall, it has been said that notice is necessary in order to 'perfect' the title of the assignee—in order to 'complete' his title. Those expressions have frequently been used; but they are, I venture to think, little more than mere phrases. Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in Foster v. Cockerell." * * *

(4) L. R. 7, E. & I. p. 506.

"Much of the reasoning in Dearle v. Hall is founded upon Ryall v. Rowels (1). Indeed, as observed by Wigram V. C. in Wil-
42 mot v. Pike (5), it is impossible to read Sir Thomas Plumer's very elaborate judgment without seeing that his opinion as to the mode of transferring equitable interests in property not capable of actual delivery, 'was borrowed entirely from the decisions in bankruptcy as to the acts which were necessary under the statute to take a chose in action out of the order and deposition of a bankrupt.' The doctrine of reputed ownership is entirely the creature of statute, and applicable by statute in cases of bankruptcy only. I cannot help thinking that, in extending the doctrine to cases of equitable assignment of personal property where there is no bankruptcy (which is practically what was done in Foster v. Cockerell), the court has gone perilously near legislating. The inconvenience of such a course is obvious, and the result has been singular. The law relating to reputed ownership in bankruptcy has been altered from time to time. When Dearle v. Hall was decided, it extended to all choses in action. Now it does not apply to choses in action at all, except to 'debts due, or growing due, to the bankrupt in the course of his trade or business.' But the rule in Dearle v. Hall founded in great measure on the bankruptcy law as it existed sixty years ago, remains unaltered, and it is beyond the power of any Court to alter it.

"I am inclined to think that the rule in Dearle v. Hall has on the whole produced at least as much injustice as it has prevented. It was argued in Dearle v. Hall that notice to the trustees necessarily prevents fraud on the part of the assignor. 'The trustees,' said Mr. Sugden, 'are converted into a register, and by applying to them everyone who proposes to negotiate for the purchase of the fund, except in the very improbable event of the trustees incurring personal responsibility by lending themselves to the vendor's dishonest purposes, is enabled to ascertain whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him.' That argument was in substance adopted by the Court."

In Lloyd's Bank v. Pearson, 1901, see C. D. Vol. 1, 865, at page 872, Cozens-Hardy, J., said:

"I have carefully read Lord Macnaghten's judgment in Ward v. Duncombe, which I accept as a guide, but I do not profess to
43 be able to discover any definite principle upon which the rule in Dearle v. Hall is founded. Nevertheless, it must now be recognized as a positive rule, though it is not one to be extended."

In 1 Ames Cases on Trusts, page 326, is a note on Dearle v. Hall, and on page 327 a quotation from Meux v. Bell, 1 Hare, 73 in which an attempt was made to answer the objection that if no inquiry is made the puisne incumbrancer has not in point of fact been deceived or injured by the neglect of the prior incumbrancer.

(1) 1 Ves. 348.

(5) 5 Hare at p. 19.

The answer seems to be that the second incumbrancer's notice has the effect of inquiry, and if he is not told when he gives his notice that there is a prior incumbrance, he thenceforward relies, and may be injured by reliance after his notice.

In the present case, however, though the second assignee took its assignment on July 15, 1919, it gave no notice until on or about September 20, 1919; six days before the assignor, the Nelson Company, was placed in the hands of a receiver. Reliance during this period cannot take the place of reliance at the time of parting with its money, as a ground for estopping the first assignee by reason of its negligence.

That inquiry by the second assignee before making his loan would have disclosed nothing affords no reason for excusing inquiry. It is true that we cannot apply the rule that he who fails to make inquiry is bound by what inquiry would have disclosed. But we may apply the rule that there can be no estoppel of the first assignee without reliance by the second assignee, and that negligence of the first which did not affect the conduct of the second, or of the debtor, has no more weight in equity than at law. In considering whether there was negligence we must consider the rule of diligence established by the state statute. Apparent ownership or reputed ownership does not mean a grantor's assertion of ownership. Ownership of the assignor is not otherwise apparent in a transaction like this until inquiry is made and no prior assignment found. Before that reliance is solely upon the word of the assignor.

The defendant relies especially upon decisions in the Second Circuit, which it must be admitted approve its contention.

44 In the earlier case of In re Gillespie, 15 Fed. 734, not cited by defendant, Judge Addison Brown qualifies the rule by the phrase "and where the latter has used all due diligence by inquiry and notice, the equity of the latter is to be preferred over that of the former."

In the case of Methven v. Staten Island Co., 66 Fed. 113, the second assignee seems to have perfected his title by acceptance of the debtor. The recent case of in re Leterman, Becher & Co., 260 Fed. 543, however, drops all qualification from the rule and rests the decision squarely upon priority of notice. I find myself unable to agree with the decision of that court, though I have given it most careful consideration.

It is also held, but without discussion of the question, that the rights of successive assignees of the same fund presents a question of "general jurisprudence". This was first held by the Circuit Court of Appeals of the Second Circuit in Methven v. Staten Island Light, Heat & Power Co., 66 Fed. 113, and was followed in In re Leterman, Becher Co., Inc., 260 Fed. 543, 547. In the latter case it was said that an assignee of a chose of action who omits to give notice is guilty of the same neglect as he who leaves a personal chattel, to which he has assumed title, in the actual possession and under the absolute control of another person.

But it should be observed that this question as concerns chattels has repeatedly been held to be a matter of local law in cases relating

to conditional sales and chattel mortgages. Etheridge v. Sperry, 139 U. S. 266; Thompson v. Fairbanks, 196 U. S. 516; Humphrey v. Tatman, 198 U. S. 91; York Mfg. Co. v. Cassell, 201 U. S. 344; Bryant v. Swofford Bros., 214 U. S. 279.

It is impossible to rely upon analogy to a fixed legal rule concerning reputed or apparent ownership of chattels, since the laws of the states differ widely on this subject. The courts of the United States have applied the rule that an assignee of a legal right of action who may have a remedy in a suit at law in the assignee's name has no right to equitable relief. Glenn v. Marbury, 145 U. S. 499, 508, 509.

Assignments of legal choses in action are in a different class
45 from assignments of strictly equitable interests. The security acquired by the assignee is to be made effective through action at law. To establish by statute or by decisions of its courts legal rules which shall regulate a transfer of such a right seems beyond question within the power of a state. Whether assignments shall be recorded in a registry or what other steps shall be taken to perfect the transfer of A's legal right to B is as truly a matter of local policy as are like questions concerning conditional sales of chattels. If an assignment in writing delivered to the assignee is deemed sufficient a court of the United States should not attempt to prescribe for the states a general rule of public policy which imposes conditions additional to or contrary to those prescribed by the laws of the state.

Can we say that the first assignment, wholly a Massachusetts contract, is not effective to pass to the assignee all the right which the assignor had at the time of assignment, because he did not notify the debtor, when by the law of the state it has been decided that he need not do so? Is he to be held negligent in failing to do what the law of the state holds he need not do? Is a citizen of Delaware doing business in Boston entitled to say that though the first assignee has a perfect title against all citizens of Massachusetts he has not such title against a citizen of Delaware? Is a debtor receiving notices from both before payment to be under an obligation in the state courts to pay the first assignee, and also under an obligation under Federal law to pay the second assignee?

In order to do complete justice to all the parties it seems necessary to provide for reimbursement of one of them by the assignor who has been paid twice. If the second assignee, who has been fraudulently induced to rely upon the assignor's statement, may, by giving notice, shift the consequences of this fraud to the shoulders of the first assignee in a Federal Court of Equity, that court must be able to afford him a remedy against the assignor.

The consequences that may follow from adopting in the Federal Courts one general rule,—the general rule that priority of notice gives priority of right,—must not be ignored. As there are
46 many states which, like Massachusetts, New York and New Hampshire, reject the rule (see also 1 Ames Cases on Trusts, 326, 327), it will override the laws of many states, unsettle rights under the laws of those states, and thus infringe the rule that the

Federal Courts administer the laws of the state; and this not upon a question of conscience, but upon a rule of policy which "gives the go-by to all considerations founded upon the conduct of the parties." Ward v. Duncombe, 1893, A. C. 369, 390. In Massachusetts or New York a second assignee might recover from the assignor on the ground of fraud or failure of consideration. The first assignee can, of course, have no right of recovery, since he has not been defrauded, he was not deceived, and the subsequent assignment was not in fraud of his right, since it did not deprive him of anything.

The assignor has been paid twice for the fund that he has assigned. The first assignee cannot in the state court recover his money from the assignor, because, under the law of the state he received full consideration. The second assignee cannot in the Federal Court recover his money, because under the rule of "general jurisprudence" he received full consideration. The first assignee loses his right to the fund by the act of the second assignee, in giving notice which creates in him a right by converting an assignment worthless under the law of the state into an assignment valid in a Federal Court of Equity. The first assignee is thus penalized by a Court of Equity for a neglect which has not had the least effect upon the conduct of the second assignee.

It is not the function of a Court of Equity to punish negligence in the abstract; nor should a Court of Equity create a law of notice which circumvents the established rules of estoppel and negligence.

The confusion introduced in the English courts of a single jurisdiction by splitting the decision in Dearle v. Hall into two distinct parts, one the question of equitable estoppel by negligence, the other the question of superior diligence in giving notice to the debtor, is apparent from reading the case of Ward v. Duncombe. The
47 confusion that will result from incorporating this rule of notice in the single system of Equity administered by the Federal Courts, while dealing with transactions arising under the laws of many independent jurisdictions, is a sufficient practical reason for rejecting the rule. If in England the rule, as Lord Macnaghten has said: "has on the whole, produced at least as much injustice as it has prevented", we should not adopt it as a fundamental rule of equity. It is not a rule of conscience, but as best a rule of doubtful and disputed policy as to the mode of transfer of substantial rights.

It is said notice must be given to protect third persons against fraud; but third persons who make no inquiry are not so protected, even if notice is given the debtor. It is inquiry of the debtor, and reliance upon the result of inquiry, a title apparently unincumbered, that may create an equity. Notice alone cannot create a right. A rule that requires notice but excuses inquiry is not a consistent rule of equity. A duty to give notice implies a duty to inquire: Halsbury's Law of Eng., Vol. 4, Sec. 821. Equity may require one to pay for the consequences of his negligence, but should not penalize negligence, when, as a matter of fact, it did no harm.

Taking the decision in Dearle v. Hall as a whole, coupling together inquiry, reliance and notice, we have the rule as stated in Somerset v. Cox, 33 Beav. 634, 639; "By means of it money may safely be lent

on security of trust funds on ascertaining that the trustee has no notice of any prior incumbrance."

As an exception to the general rule that he who is prior in time is prior in right this seems to be a reasonable rule that can be administered without contradication of the established principles of estoppel and laches. We are not required by the decisions of the Supreme Court to go further.

The further exception from that general rule of cases where the second assignee is prior merely in giving notice ex post facto is not supported by substantial reasons.

If it can be said that there is such a general probability of fraudulent action by an assignor as requires an assignee to take steps
48 for the protection of third parties; in itself a doubtful proposition; it must also be said that this probability should equally call for an inquiry by an assignee for his own protection. It is not enough for him to inquire or give notice after he has expended his money. He cannot mend his own neglect and protect himself by charging another with failure to protect him by giving notice which would not have warned him except on inquiry.

That the rule applied in Leterman, Becher Co., Inc., 260 Fed. 543, 549, is an arbitrary verbal formula, not based upon equitable principles, is illustrated by the decision on the facts of that case. The rights of assignees who dispatched notices by mail on the same day were determined by the comparative speed of a registered and an unregistered letter of notice in the mail. The first assignee, who took the reasonable precaution of registering his letter of notice, thereby made it slower and lost in the race. The clock created the superior equity.

The fact that the Supreme Court in Coleman & Co. v. Tawas Co., 250 U. S. 668, denied certiorari in In re Leterman, Becher & Co., 260 Fed. 543, adds nothing to the authority of the case in the lower court. See Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251, 257, 258.

Time is of the essence or not of the essence, according to circumstances. When, as in this case, both notices reached the debtor long before the completion of the work, and long before the date of payment, and where the money was paid over upon the joint request of both, the time of the second assignee's notification seems wholly insignificant and unsubstantial.

As either assignment would exhaust the fund in controversy it seems unnecessary, on the agreed facts, to discuss the difference between total and partial assignments, or between unconditional assignments and those made by way of mortgage or hypothecation. It is settled law that the legal effect of a transaction involving pledge or hypothecation depends upon the local law. Dale v. Pattison, 234 U. S. 399; Taney v. Penn Bank, 232 U. S. 174.

I am of the opinion that we should give effect to the rights
49 & 50 of the plaintiff-appellant under the law of Massachusetts.

I am also of the opinion that the defendant-appellee has not established upon accepted principles of equitable jurisprudence a right to an equitable preference over the prior assignee.

51 On October 13, 1921, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson, Circuit Judges, and Honorable Arthur L. Brown, District Judge, sitting.

Thereafter, to wit, on the eleventh day of April, A. D. 1922, the opinion of the court (page 31) was announced, a dissenting opinion by Brown, J. (page 34), was filed and the following Final Decree was entered:

Final Decree.

April 11, 1922.

This cause came on to be heard October 13, 1921, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 11, 1922, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, with costs to the Manufacturers' Finance Company, appellee, in this court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on the sixth day of June, A. D. 1922, the following Motion for Stay of Mandate was filed:

Motion for Stay of Mandate.

June 6, 1922.

Now comes the plaintiff, appellant, in the above-entitled cause and represents to this Honorable Court that it intends to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore it moves that the issue of the mandate in the above-entitled cause be stayed pending the determination by said Supreme Court of its petition for said writ, or until the further order of this court.

By Its Attorneys, WARREN, GARFIELD, WHITESIDE & LAMSON.

Dated June 5, 1922.

52 On the same day, to wit, on the sixth day of June, A. D 1922, the following Order of Court was entered:

Order of Court.

June 6, 1922.

Upon motion of appellant, setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court, upon the condition that said petition is

duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 52, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including June 16, 1922, in the cause in said court numbered and entitled, No. 1515, Salem Trust Company, Plaintiff, Appellant, v. Manufacturers' Finance Company et al., Defendants, Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this sixteenth day of June, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

53 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Salem Trust Company is appellant, and Manufacturers' Finance Company et al. are appellees, No. 1515, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
54 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

55 [Endorsed:] File No. 29024. Supreme Court of the United States, October Term, 1922. No. 474. The Salem Trust Company vs. Manufacturers' Finance Company et al. Writ of Certiorari.

56 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the transcript of record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this third day of November, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

57 United States Circuit Court of Appeals for the First Circuit.

No. 1515.

THE SALEM TRUST COMPANY, Plaintiff, Appellant,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants, Appellees.

Stipulation.

In the above-entitled case it is stipulated that the transcript of record heretofore filed in the Supreme Court of the United States in support of the petition for certiorari may be taken as a return to the writ of certiorari.

ALEXANDER WHITESIDE,
Attorney for Plaintiff.
ROBERT G. DODGE,
Attorney for Defendants.

November 3, 1922.

A true copy.
Attest:

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

58 [Endorsed:] File No. 29,024. Supreme Court U. S., October Term, 1922. Term No. 474. The Salem Trust Co., Petitioner, vs. Manufacturers' Finance Co. et al. Writ of certiorari and return. Filed Nov. 6, 1922.

No. [redacted]74

JUL 10 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1921

No.

THE SALEM TRUST COMPANY,
Petitioner

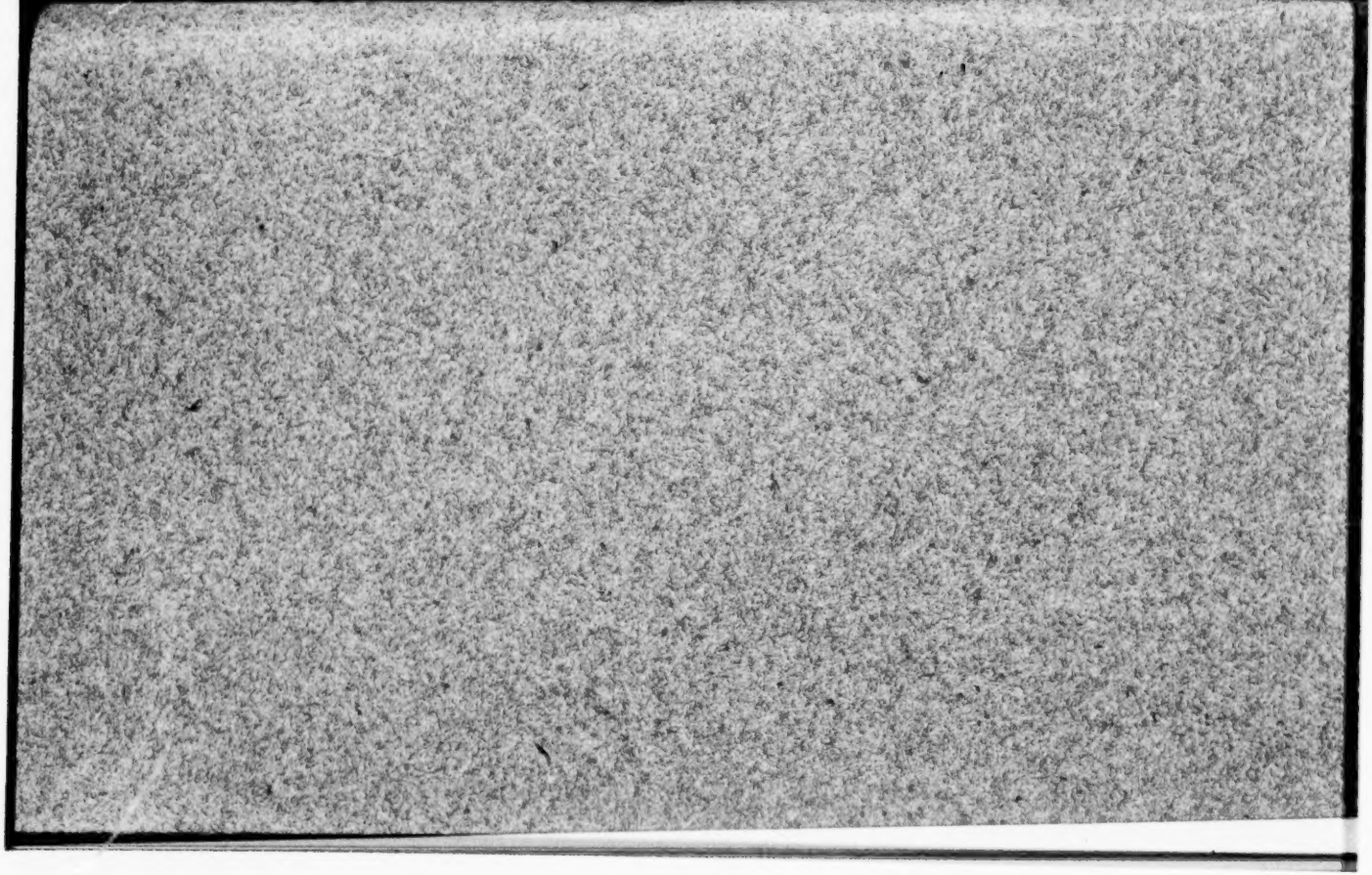
v.

MANUFACTURERS' FINANCE COMPANY ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF FOR PETITIONER

ALEXANDER WHITESIDE
HOWARD STOCKTON, Jr.
RAYMOND P. BALDWIN
Counsel

PRESS OF GEO. H. ELLIS CO., INC., BOSTON



SUBJECT INDEX

PAGES

PETITION FOR CERTIORARI 1

BRIEF

Statement of Facts 7

Statement of questions involved 9

The case was erroneously removed from the Massachusetts Courts 10

Substantive grounds for certiorari 11

Introduction 11

The decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decision of Circuit Court of Appeals for the Sixth Circuit in *Petition of the National Discount Company*, 272 Fed. 570 (1921) . . 14

Said decision is contrary to the rule laid down by the Supreme Judicial Court of Massachusetts 16

Said decision is inconsistent with the principles laid down by the Supreme Court of the United States in *Greey* v. *Dockendorff*, 231 U. S. 513 19

Said decision is contrary to the true principles of law and equity pertaining to the question involved 20

The question involved is one of great importance 24

Conclusion 25

CASES CITED IN BRIEF

	PAGES
Bryant v. *Swofford*, 214 U. S. 279	18
Coleman & Co. v. *Tawas Co.* (*See In re Leterman, Becher & Co.*), 250 U. S. 668	17, 25
Dearle v. *Hall*, 3 *Russell* 1	17, 21, 23
Etheridge v. *Sperry*, 139 U. S. 266	18
Farmers & Merchants Bank v. *Farwell*, 58 Fed. 633, 637 to 639	20, 23
Greey v. *Dockendorff*, 231 U. S. 513	18, 19, 20, 23
Hamilton Brown Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 257, 258	17, 25
Hawley Down-Draft Furnace Co., 238 Fed. 122	20
Herman v. *Conn. Mutual Life Ins. Co.*, 218 Mass. 181, 186	16
Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 315	12
Humphrey v. *Tatman*, 198 U. S. 91	18
Judson v. *Corcoran*, 17 Howard 612	17, 20, 22, 23
Laclede Bank v. *Schuler*, 120 U. S. 511 at 516	20, 22, 23
In re Leterman, Becher & Co. 260 Fed. 543	17, 20, 23, 24, 25
Mass. & Southern Construction Co. v. *Cane Creek Township*, 155 U. S. 283	10
Methven v. *Staten Island Light, Heat and Power Co.*, 66 Fed. 113	17, 20, 23, 24, 25
Petition of National Discount Company, 272 Fed. 570	14, 20, 25
Putnam v. *Story*, 132 Mass. 205	16
Rabinowitz v. *People's National Bank*, 235 Mass. 102, 104	16
Shaffer v. *Carter*, 252 U. S. 37, 53	12
Spain v. *Hamilton's Administrator*, 1 Wall. 604	17, 20, 22, 23
Thayer v. *Daniels*, 113 Mass. 129	16
Thompson v. *Fairbanks*, 196 U. S. 516, 523	18
Wilson v. *Oswego Township*, 151 U. S. 56	10
York Mfg. Co. v. *Cassell*, 201 U. S. 344	18

Supreme Court of the United States

OCTOBER TERM, 1921

No.

THE SALEM TRUST COMPANY,

Petitioner

v.

MANUFACTURERS' FINANCE COMPANY ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF FOR PETITIONER

To the Honorable Justices of the Supreme Court of the United States:

Respectfully represents your Petitioner, The Salem Trust Company:

I. That it is a trust company duly organized under the laws of the Commonwealth of Massachusetts, and having its principal place of business in Salem in said Commonwealth and that, as such, part of its authorized business is to lend money and to receive therefor assignments of accounts receivable.

II. On May 16, 1919, your Petitioner made a loan to the Nelson Blower & Furnace Company, a Massachusetts corpora-

tion, of money, for which your Petitioner received as security an assignment to it by the Nelson Blower & Furnace Company (hereinafter called the assignor) of accounts receivable owed to the assignor by the Murray & Tregurtha Corporation, also a Massachusetts corporation.

III. This assignment was made and took effect in Massachusetts, the assignor and assignee both being citizens of Massachusetts, the person owing the money which was assigned, being a citizen of Massachusetts, and the money being payable in Massachusetts.

IV. Subsequent to this assignment the assignor assigned the same accounts receivable to the Respondent, Manufacturers' Finance Company, (a corporation duly organized and existing under the laws of the State of Delaware, but having a usual place of business in Boston in the District of Massachusetts, having complied with the provisions of the Massachusetts laws relative to doing business in Massachusetts by foreign corporations,) which took the assignment as security for a loan to the assignor, without inquiring of the Murray & Tregurtha Corporation as to whether notice had been given it of any previous assignment.

V. On or about September 20, 1919, about one week before the assignor was placed in the hands of a receiver, the Respondent, Manufacturers' Finance Company, notified the Murray & Tregurtha Corporation that the accounts receivable had been assigned to the Manufacturers' Finance Company.

VI. The rival assignees agreed with each other that the assignor should finish the work being done for the Murray & Tregurtha Corporation and that the net proceeds amounting to $7963.36 (less than the amount of the claim of either assignee) should be deposited in the Respondent, the International Trust Company, (a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and having a usual place of business in Boston in the District of Massachusetts,) in a special deposit standing in the name of the Manufacturers' Finance Company as trustee, pending the determination by a court of competent jurisdiction, of the question as to which assignee was entitled to such proceeds.

VII. Your Petitioner, in accordance with the terms of the agreement between it and the Respondent, Manufacturers' Finance Company, brought a Bill in Equity in the Superior Court for the County of Suffolk and Commonwealth of Massachusetts, and the Respondent, Manufacturers' Finance Company, filed a Motion that the suit should be removed to the District Court of the United States for the District of Massachusetts, and, against the objection of your Petitioner, the suit was so removed and was heard by Anderson, J., and dismissed by a Final Decree entered May 6, 1921.

VIII. Thereafter, upon appeal by The Salem Trust Company, the United States Circuit Court of Appeals for the First Circuit, by a decision handed down on April 11, 1922, affirmed the decree of the District Court, with costs, to the Manufacturers' Finance Company, appellee in that Court. A dissenting opinion was rendered by Brown, J.

IX. That in none of the aforesaid proceedings has it been denied that the parties to the first assignment were both citizens of Massachusetts and that the debtor owing the account assigned, was a citizen of Massachusetts; nor that the first assignment was made in Massachusetts; nor that the second assignment was made in Massachusetts, by a citizen of Massachusetts to a citizen of Delaware, a corporation actually having a place of business in Massachusetts, on account of a compliance with the laws of Massachusetts, of an account owed to the assignor by a citizen of Massachusetts, and payable in Massachusetts. Nor has it been denied that by the law of the Commonwealth of Massachusetts, as set forth in the decisions of its Supreme Judicial Court, a prior assignment prevails against a subsequent assignment, unless the subsequent assignee at least made inquiry of the debtor and was actually deceived by the failure of the prior assignee to give notice. Nor was it in any way contended in the aforesaid proceedings that the Respondent, Manufacturers' Finance Company, made any inquiry of the debtor prior to accepting the assignment of the said accounts receivable.

Questions Involved and Grounds on which your Petitioner Bases this Application

1. Was the proceeding erroneously removed from the Massachusetts Court to the United States Court?

2. Which assignee has the prior claim to the proceeds of the assigned accounts?

The Circuit Court of Appeals for the First Circuit held the second assignee should prevail, on account of the fact that it had first given notice to the person owing the assigned accounts. Your Petitioner contends that said decision is erroneous and that it should be reviewed by this Court for the following reasons:—

(*a*) Because said decision is inconsistent with the principles laid down by the Circuit Court of Appeals for the Sixth Circuit in

Petition of National Discount Company, 272 Fed. 570.

(*b*) Because said decision is contrary to the rule in such cases laid down by the Supreme Judicial Court of Massachusetts,—

Putnam v. *Storey*, 132 Mass. 205;
Thayer v. *Daniels*, 113 Mass. 129;
Herman v. *Connecticut Mutual Life Insurance Co.*, 218 Mass. 181, 186;
Rabinowitz v. *People's National Bank*, 235 Mass. 102, 104;

and contrary to the statutory law of said Commonwealth as expressed in R. L. c. 173, sec. 4.

(*c*) Because said decision is inconsistent with the principles laid down by this Court in the case of

Grecy v. *Dockendorff*, 231 U. S. 513.

(*d*) Because said decision is contrary to the true principles of law and equity pertaining to the question involved.

(*e*) Because the question involved is one of great importance involving the rights of all persons taking assignments of *choses-in-action*.

X. Your Petitioner makes a part of this petition the reported decisions hereinbefore referred to and submits a certified copy of the record of said Circuit Court of Appeals for the First Circuit of the decree therein, and of the opinion of said Court, and the dissenting opinion of Brown, J., and a brief in support of this petition.

Wherefore your Petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled *The Salem Trust Company, Plaintiff, Appellant* v. *Manufacturers' Finance Company et al., Defendants, Appellees, No. 1515*, to the end that the said case may be reviewed and determined by this Court as provided by law, and that your Petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate.

And your Petitioner will ever pray.

THE SALEM TRUST COMPANY

By

ALEXANDER WHITESIDE
HOWARD STOCKTON, JR.
RAYMOND P. BALDWIN

Counsel

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

Alexander Whiteside, being duly sworn, says that he is one of the counsel for the Salem Trust Company, the Petitioner, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

Subscribed and sworn to before me, this day of July 1922.

Notary Public

Supreme Court of the United States

OCTOBER TERM, 1921

THE SALEM TRUST COMPANY,
Petitioner

v.

MANUFACTURERS' FINANCE COMPANY ET AL.,
Respondents

BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

FACTS

The Petitioner, a trust company organized under the laws of Massachusetts, on May 16, 1919, lent a large sum of money to the Nelson Blower & Furnace Company, a Massachusetts corporation, receiving as security, an assignment by the Nelson Blower & Furnace Company, of accounts receivable owed to it by the Murray & Tregurtha Corporation, also a Massachusetts corporation. The three parties concerned in this assignment were all citizens of Massachusetts, and the money owing was to be paid in Massachusetts (Record, pp. 17, 18).

Subsequently, namely, on or about July 15, 1919, the Nelson Blower & Furnace Company borrowed a large sum of money from the Respondent, Manufacturers' Finance Company, a Delaware corporation, but one having a usual place of business

in Boston, Massachusetts, being permitted, after compliance with the Massachusetts laws, to do business in Massachusetts, and as security, assigned to the Respondent the same accounts previously assigned to the Petitioner. The Respondent took the assignment without inquiring of the Murray & Tregurtha Corporation as to whether notice had been given to it of any previous assignment (Record, pp. 17–20, 39).

On or about September 20, 1919, about one week before the Nelson Blower & Furnace Company was placed in the hands of a receiver, the Manufacturers' Finance Company notified the Murray & Tregurtha Corporation of the assignment made to it, of the accounts receivable (Record, p. 18).

The rival assignees agreed with each other that the Nelson Blower & Furnace Company, acting by its receiver, should finish the work being done for the Murray & Tregurtha Corporation, and that the net proceeds, amounting to $7,963.36 (less than the amount of the claim of either assignee), should be deposited in the Respondent, International Trust Co. (a Massachusetts corporation having a usual place of business in Boston, Massachusetts), in a special deposit standing in the name of the Manufacturers' Finance Company, as trustee, pending the determination by a court of competent jurisdiction of the question as to which assignee was entitled to such proceeds (Record, pp. 19, 20).

The clause of the agreement between the Petitioner and the Manufacturers' Finance Company, relative to the disposition of the proceeds, reads as follows:—

> "6. If the parties hereto shall not be able to agree upon the ownership of the proceeds of any of such accounts, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time" (Record, p. 22).

In accordance with the agreement, the Petitioner brought a Bill in Equity in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, against the Manufacturers'

Finance Company and the International Trust Co., and the Manufacturers' Finance Company filed a Motion that the suit should be removed to the District Court of the United States for the District of Massachusetts, and against the objection of your Petitioner, the suit was so removed. It was heard by Anderson, J., and dismissed by a Final Decree entered May 6, 1921 (Record, pp. 1, 23).

Thereafter, upon appeal by your Petitioner, the United States Circuit Court of Appeals for the First Circuit, by a decision handed down on April 11, 1922, affirmed the decree of the District Court with costs to the Manufacturers' Finance Company, appellee. A dissenting opinion was rendered by Brown, J. (Record, pp. 34–49).

It clearly appears in the proceedings, and has not been denied, that the parties to the first assignment were both citizens of Massachusetts, that the debtor owing the accounts assigned was a citizen of Massachusetts, that the assignment was made in Massachusetts, and that the money owed was payable in Massachusetts. It further appears that the second assignment was made by a citizen of Massachusetts, of an account owed by a citizen of Massachusetts, and payable in Massachusetts, but that the assignee was a citizen of Delaware (a corporation actually having a place of business in Massachusetts, having complied with the laws of Massachusetts, permitting it to do business therein).

Questions

I. Was the proceeding erroneously removed from the Massachusetts Court to the United States Court?

II. Which assignee has the prior claim to the proceeds of the assigned accounts?

ARGUMENT

I

THE PROCEEDING WAS ERRONEOUSLY REMOVED FROM THE MASSACHUSETTS COURT TO THE UNITED STATES COURT

The Petitioner contends that the International Trust Co. is a necessary and indispensable party to the case, and as it is a citizen of Massachusetts, the case was properly brought in the State Court and should not have been removed to the Federal Court.

Wilson v. *Oswego Township*, 151 U. S. 56.

Mass. & Southern Construction Co. v. *Cane Creek Township*, 155 U. S. 283.

U. S. Compiled Statutes 1916, Vol. I, Note No. 251 on p. 650, and authorities therein cited.

The Petitioner contends that the deposit in the hands of the International Trust Co. was the trust *res*, and that in order to determine the title to this trust *res* it was necessary for the trust company to be joined as a party.

The Wilson Blower & Furnace Company, in order to have collected its claims against the Murray & Tregurtha Corporation, would have been obliged to sue in the State Courts of Massachusetts. An assignee of the claims, even though a citizen of some other State, stands in no better position than the assignor.

U. S. Compiled Statutes, Sec. 991, (1).

Manufacturers' Finance Company, being permitted to do business in Massachusetts, could be sued in the Massachusetts Courts.

G. L. of Mass., c. 181, ss. 3–8.

Therefore, the Superior Court of Massachusetts was a "court of competent jurisdiction" within the meaning of Article 6 of the Agreement of Trust above quoted.

II

THE FIRST ASSIGNEE (YOUR PETITIONER) HAS THE PRIOR CLAIM TO THE PROCEEDS OF THE ASSIGNED ACCOUNTS

The Circuit Court of Appeals in the majority opinion by Bingham, J., speaks of what it calls "the well-established rule in the Federal Courts that the party who first gives notice of his assignment is to be regarded as having the greater equity."

In the same opinion it also speaks of the law of Massachusetts "relating to the assignment of *choses-in-action*," and Brown, J., in the dissenting opinion, makes this statement: "It is conceded that under the law of Massachusetts, the fund belongs to the Salem Trust Co., the first assignee."

At the outset, therefore, it is clear that in the mind of the Court there were two rules of law,—the so-called Federal rule and the so-called Massachusetts rule. A study of the case makes it appear obvious that the Manufacturers' Finance Company thought that the law governing successive assignments of *choses-in-action* differed in the Federal and Massachusetts Courts, and that was the reason for its petition for removal of the case to the Federal Court.

An analysis of this idea existing in the minds of the Circuit Court of Appeals and of the Respondent seems appropriate and it involves three questions: *First:* What territory is the jurisdictional unit whose law applies? *Second:* What Court is to be followed in the determination of that law? *Third:* What is the rule laid down by such Court?

Since the contracts of assignment were both made in Massachusetts, and to be performed there, and since all the parties involved, with the exception of the Manufacturers' Finance Company, were Massachusetts corporations, and since the forum was a Massachusetts forum, it is evident that the territorial law of Massachusetts must govern all the questions involved, unless the fact that the Manufacturers' Finance Company was a Delaware corporation, gives it the right to demand

the application of the law of some other geographical unit. That the Respondent has no such right, is evident from the cases cited by Brown, J., in his learned dissenting opinion in the Court below (Record, p. 37), namely:

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 315.
Shaffer v. *Carter*, 252 U. S. 37, 53.

But, though the territorial law of Massachusetts applies, there still remain the questions as to what is the territorial law of Massachusetts, and what ought properly to influence the Federal Courts in their declaration of such law. This is well stated by Professor Beale in the Summary to the 1902 Edition of Beale's Cases on Conflicts of Laws, as follows:—

> *Sec. 13.* "When two courts of equal authority, and without a common superior, have the duty of declaring the same law, there is no possibility of compelling them to adopt the same view of the law. If they differ, this cannot mean that there are two laws, but merely that one court or both, is mistaken in its statement of the law.
>
> An example of such co-ordinate courts, without a common superior is the State and Federal Courts, in all cases where Federal jurisdiction depends upon diverse citizenship. *In such cases the Federal Court is declaring the law of the State*, but declines to accept as binding, a prior declaration of the law by the State Court."

The majority opinion in the Circuit Court of Appeals held that the relative merits of the equities of successive assignees of the same *chose-in-action* was a question of general jurisprudence, and that, consequently, the Federal Courts were not bound by decisions of the State Courts in determining the territorial law of Massachusetts.

The decision seems erroneous. The law involved is the body of law governing the physical territory of the Commonwealth of Massachusetts. There can be only one true body of law governing any geographical unit. The Massachusetts Courts have an established rule on the precise question here involved.

If the rule thus established is not the law of Massachusetts, it must be because of the existence of another rule of law applicable to Massachusetts, which the Federal Courts sitting in Massachusetts are bound by precedent or are at liberty to follow. If the Federal Courts declare a rule of law without the restrictions of a binding precedent, then such rule must be in accordance with reason and the true principles of law and equity pertaining to the question involved. If they are bound by precedent, it must be precedent applicable within the territorial limits of their jurisdiction, as established either by the State Courts, by the District or Circuit Courts for Massachusetts, or by the Supreme Court of the United States, either for Massachusetts, or for the United States as a whole. The decisions of the Circuit Court of Appeals for the other Circuits are not binding upon the Circuit Court of Appeals for the First Circuit; although conflicting decisions in different Circuits, where not justified by a similar conflict between the rules of the State Courts in their respective territories, may indicate that one or the other is in error, and thus justify the granting of a writ of certiorari.

The Petitioner contends that the true rule applicable to this case is the rule that notice to the debtor is not necessary to protect a prior assignee of a *chose-in-action* against a subsequent assignee who, having made no inquiry of the debtor, was not deceived by want of such notice, and who has not acquired a legal title prior to such notice.

The Petitioner further contends that the decision of the Circuit Court of Appeals for the First Circuit is erroneous, and should be reviewed, for the following reasons:—

(*a*) It is inconsistent with the principles laid down by the Circuit Court of Appeals for the Sixth Circuit.

(*b*) It is contrary to the rule laid down by the Supreme Judicial Court of Massachusetts.

(*c*) It is inconsistent with the principles laid down by the Supreme Court of the United States.

(*d*) It is contrary to the true principles of law and equity.

(c) The question is one of great importance, affecting the rights of all persons taking assignments of choses in action.

(a)

THE INDIANA ASSIGNMENT ACTS AND PREVIOUS LEGISLATION ON THE SUBJECT.

In *Petition of the National Discount Company*, [redacted] a petition was brought by an assignee of accounts receivable against the trustee in bankruptcy of the assignor. The court said (page [redacted]):

> "Under the generally accepted rule of law and where no fraud, the rights of the debtors under the accounts are not involved, the assignments in question, made in the usual course of business, were valid as against both the bank and the creditors, notwithstanding no notice was given the latter, and in spite of the fact that the assigned claims remained in the bankrupt's possession, and the [redacted] liable to pay the claims were not notified of the assignment.
>
> "[redacted]"

The court continues (on page [redacted]):

> "By the General Law as interpreted by the courts of Tennessee, notice to the debtor of the assignment of a chose in action is necessary to perfect it as against either the debtor or subsequent assignees or creditors. The holding of the Tennessee courts that notice to the debtor is necessary to the validity of an assignment of choses in action is based upon an interpretation of the General Law

The Court in the Sixth Circuit, where the rule of the Tennessee Courts is that stated above as the Federal Court rule, holds that the Tennessee rule is opposed to the great weight of authority, and cites in support of this view the Federal cases above mentioned.

It will be contended by the Respondent, Manufacturers' Finance Company, that there is a distinction between these two cases, namely, that the case in the Sixth Circuit deals with a trustee in bankruptcy of the assignor.

It is evident, however, that the Court in the Sixth Circuit considered the necessity of notice to protect the first assignee from later assignments as well as from creditors and trustees in bankruptcy of the assignor. It refers to the Tennessee rule as holding that "notice to the debtor of the assignment of a *chose-in-action* is necessary to perfect it as against either the debtor or *subsequent assignees* or creditors." It makes no distinction between subsequent assignees and creditors in its statement that the Tennessee rule is contrary to the great weight of authority.

It is submitted that the two decisions present a clear conflict of authorities, and that this Court should take jurisdiction of the Petitioner's case by a writ of certiorari, in order to define a correct rule that may be uniformly applied.

(*b*)

THE DECISION IS CONTRARY TO THE RULE IN SUCH CASES LAID DOWN BY THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

See:

Thayer v. *Daniels*, 113 Mass. 129.
Putnam v. *Story*, 132 Mass. 205.
Herman v. *Conn. Mutual Life Ins. Co.*, 218 Mass. 181, 186.
Rabinowitz v. *People's National Bank*, 235 Mass. 102, 104.

By these cases the Massachusetts rule is settled that the first assignee of a *chose-in-action* prevails against a later assignee, unless either the first assignee is estopped or the second assignee gets legal title. It is admitted by the Respondent and was decided by both lower Courts that under the Massachusetts rule your Petitioner would prevail.

The only authorities relied upon by the majority in the Circuit Court of Appeals in our case in refusing to follow the rule thus laid down were the cases of

Methven v. *Staten Island Light, Heat and Power Co.*, 66 Fed. 113;
In re Leterman, Becher & Co., 260 Fed. 543;

and the fact that certiorari was denied in the latter case. Both are cases in the Second Circuit. The latter rests solely upon the former. The former merely states, without discussion or authority, that where questions of general jurisprudence are concerned, the State Court decisions need not be followed, and declares itself bound by *Judson* v. *Corcoran*, 17 Howard 612, and *Spain* v. *Hamilton's Administrator*, 1 Wall. 604, to follow the rule of *Dearle* v. *Hall*, 3 Russell, 1. The cases of *Judson* v. *Corcoran* and *Spain* v. *Hamilton's Administrator, supra*, will be dealt with more fully later, but it should be noted that both were cases arising in the District of Columbia where no State law was involved. As to the denial of certiorari, Brown, J., points out in his dissenting opinion that "the fact that the Supreme Court in *Coleman & Co.* v. *Tawas Co.*, 250 U. S. 668, denied certiorari in *In re Leterman, Becher & Co.*, 260 Fed. 543, adds nothing to the authority of the case in the lower Court.

See

Hamilton Brown Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 257, 258."

In any event the denial of certiorari in that case should not affect the rights of the parties here for the contracts in *In re Leterman, Becher & Co., supra*, were made after the decision in that Circuit of *Methven* v. *Staten Island Light, Heat and Power Co., supra;* whereas in our case, when the assignments

were made, the established decisional rule of the Massachusetts State Courts was as yet unassailed by any contrary decision of its Federal Courts, and the petition for certiorari in the *Leterman* case had not been denied.

We are unable to find any decision of your Honorable Court to the effect that the requirement of notice by an assignee of a *chose-in-action* to the debtor is a question of general jurisprudence. The contrary would seem to appear from the application of local law in *Green* v. *Dockendorff*, *supra*.

Since the rule of the necessity of notice laid down in the case of *In re Leterman, Becher & Co.*, *supra*, is in the nature of a recording act, it would seem that the cases of conditional sales and chattel mortgages should by analogy, apply. Yet in those cases local law has been followed.

Etheridge v. *Sperry*, 139 U. S. 266.
Thompson v. *Fairbanks*, 196 U. S. 516, 523.
Humphrey v. *Tatman*, 198 U. S. 91.
York Mfg. Co. v. *Cassell*, 201. U. S. 344.
Bryant v. *Swofford*, 214 U. S. 279.

In the last cited case of a conditional sale, both merchandise and book accounts were treated alike, and the local law of the State was applied.

In his dissenting opinion in the Circuit Court of Appeals in our case, Brown, J., says:—

> "If an assignment in writing delivered to the assignee is deemed sufficient, a court of the United States should not attempt to prescribe for the states a general rule of public policy which imposes conditions additional to or contrary to those prescribed by the laws of the state."

It appears to your Petitioner that it is the function of a legislature, rather than of a court, to require a notice by an assignee to a debtor of a *chose-in-action*, in order to protect subsequent assignees.

For the reasons stated, it is submitted that the Circuit Court of Appeals for the First Circuit should have followed the Massachusetts cases above cited.

(c)

THE DECISION IS INCONSISTENT WITH THE PRINCIPLES LAID DOWN BY THE SUPREME COURT OF THE UNITED STATES

See

Greey v. *Dockendorff*, 231 U. S. 513.

In that case the question was one of the validity of liens claimed by Dockendorff, a creditor, on accounts receivable assigned to him by the bankrupt. The case arose on a petition against the trustee in bankruptcy. It appeared that Dockendorff had lent money to the bankrupt under an agreement whereby the bankrupt was to assign to Dockendorff accounts receivable within seven days of shipment of goods. Were such assignments good as against general creditors of the bankrupt? The Court held that they were, and said at page 516 (Mr. Justice Holmes):—

> "The advances were the liens by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *New York*, 6 N. Y. 179. . . . It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors. *Williams* v. *Ingersoll*, 89 N. Y. 508, 522, and merely keeping silence to the latter whether known or unknown created no estoppel.
>
> *Wiser* v. *Lawler*, 189 U. S. 260 at 270.
> *Ackerman* v. *True*, 175 N. Y. 353, 363.
>
> There was no active concealment and no attempt to mislead any one interested to know the truth."

It appears that your Honorable Court, in considering the question of the validity of an assignment, applied the local law as laid down by decisions of the New York Courts. The Circuit Court of Appeals for the First Circuit in our case refused under similar circumstances to apply the local law established by the Massachusetts Courts.

In *Greey* v. *Dockendorff*, furthermore, your Honorable Court

held that notice to the debtors was not necessary to the validity of an assignment where there was no attempt to mislead any one interested to know the truth. The Circuit Court of Appeals in the First Circuit in our case required that notice be given by the first assignor, although it had made no attempt to mislead anyone, and although apparently the later assignee was not sufficiently interested to inquire as to prior assignments.

(d)

THE DECISION IS CONTRARY TO THE TRUE PRINCIPLES OF LAW AND EQUITY

The scholarly dissenting opinion of Brown, J., in our case sets forth clearly and at length the true state of the law and the sound reasons which led him to find for your Petitioner. We refer your Honorable Court to that opinion.

The majority opinion rests solely upon the assumption that an arbitrary rule of law already existed, which the Circuit Court of Appeals for the First Circuit was bound to follow. The rule is stated thus: "That the party who first gives notice of his assignment is to be regarded as having the greater equity," and in support of the decision the Court cites:—

Judson v. *Corcoran, supra.*
Spain v. *Hamilton's Administrator, supra.*
Laclede Bank v. *Schuler,* 120 U. S. 511 at 516.
Methven v. *Staten Island Light, Heat and Power Co., supra.*
In re Leterman, Becher & Co., supra.
Farmers and Merchants Bank v. *Farwell,* 58 Fed. 633, 637 to 639.

It is apparent that so far, at least, as general creditors of the assignor are concerned, notice by an assignee to the debtor is not necessary to protect an assignment.

Greey v. *Dockendorff, supra.*
Petition of the National Discount Co., supra.
Hawley Down-Draft Furnace Co., supra.

If, therefore, such notice is necessary to protect the first assignee from a later assignee of the same *chose-in-action*, it must be because of the existence of some condition subsequent invalidating an assignment already valid. If any rule thus abrogating an existing right has been established by your Honorable Court, it should be strictly applied, and it is not within the province of the Circuit Court of Appeals for the First Circuit recklessly to enlarge it.

Under the Massachusetts rule as set forth in the Massachusetts cases above cited, the title of an assignee of a *chose-in-action* who has given no notice to the debtor can be defeated by a subsequent assignee who obtains legal title, or can show such conduct or neglect on the part of the first assignee, and action in reliance thereon, as to raise an estoppel. It is submitted that this rule offers adequate protection to subsequent assignees, and that the cases relied upon to support the so-called "Federal Rule" do not, in fact, go beyond the rule thus laid down by the Massachusetts Courts.

The doctrine on which the cases applying the so-called "Federal Rule" are supposed to stand, relates back to the English case of *Dearle* v. *Hall*, 3 Russell, 1. There the third assignee of the equity of a *cestui que trust* was the first to give notice to the trustee. The Court held that the assignee thus giving notice prevailed over the prior assignees. But this third assignee had made inquiry, and the following extract shows that the Court thought this fact material:—

> (page 18) "It was said that Hall (the successful assignee) had not exercised due diligence; for that the question, whether there was any prior encumbrance on the fund was not put directly either to Brown (the assignor) or to the executor, and it is true that the question was not put in expressed words; but was it not put in substance? The inquiries were such as drew from Unthank (the trustee) what is tantamount to an assurance that there was an absolute title in Brown."

Failure on the part of the courts in some of the Federal cases clearly to remark the material circumstance relied on by the Court in *Dearle* v. *Hall*, is, in the opinion of your Petitioner, the cause of the confusion which has arisen.

Of the cases relied upon by the majority of the Circuit Court of Appeals for the First Circuit, there are only three decided by your Honorable Court. These are:—

Judson v. *Corcoran*, *supra*.
Spain v. *Hamilton's Administrator*, *supra*.
Laclede Bank v. *Schuler*, 120 U. S. 511 at 516.

In *Judson* v. *Corcoran*, a part owner of a suspended claim against Mexico, for unlawful seizure of a cargo, assigned to Judson an interest therein, subsequently assigning the entire claim to others. To the latter assignments Corcoran eventually succeeded and prosecuted the claim to a final award by the Board of Commissioners. Judson gave no notice of his claim until the final award. It was held (page 614):

> "Here Corcoran has drawn to his equity a *legal title* to the fund, (the award of the Commissioners) which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect."
>
> "Now nothing is better settled than that this cannot be done. The equities being equal, the law must prevail."

The dictum relied upon to establish the so-called "Federal Rule" is as follows:—

> "There may be cases in which the purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought, as, for instance, where the purchaser who alone has *made inquiry* and given notice to the debtor . . . would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy."

In *Spain* v. *Hamilton's Administrator*, Hamilton assigned to Spain generally all claims which he had or might later have against any person or body corporate for commissions for personal services. Later Hamilton assigned a specific claim for commission to other assignees for value. The person from whom the commission was payable "accepted" the later assignments upon notice thereof. Spain gave no notice until after

such "acceptance," six years after the assignment to him. Your Honorable Court found for the later assignees. That they had made inquiry and that your Honorable Court considered this important is seen on page 623 where it is said:—

> "On the contrary Wetmore and Corcoran and Riggs used every precaution to protect themselves before the latter lent to Hamilton $25,000."

The case of *Laclede Bank* v. *Schuler* is not a case involving successive assignments, but a check and an assignment,—an entirely different proposition. The Court said the check was only an acknowledgment of a debt.

Your Petitioner respectfully submits that your Honorable Court has never rendered any decision establishing or laying the foundation for the establishment of the so-called "Federal Rule" as it has been stated by the Circuit Court of Appeals for the First Circuit in our case, or by the Circuit Court of Appeals for the Second Circuit, in the two cases immediately hereafter dealt with. These cases are *Methven* v. *Staten Island Light, Heat and Power Co., supra*, and *In re Leterman, Becher & Co., supra*. They are not binding upon the Circuit Court of Appeals for the First Circuit. The authorities relied on in the former were *Judson* v. *Corcoran* and *Spain* v. *Hamilton, Administrator, supra*, and the latter case relied upon the former.

Another Federal case relied upon by the Circuit Court of Appeals for the First Circuit is *Farmers and Merchants Bank* v. *Farwell, supra*, a case in the Circuit Court of Appeals for the Eighth Circuit, where there is a dictum (page 637) to the effect that a prior assignee who gives no notice may be estopped, and the Court cites *Dearle* v. *Hall, supra, Spain* v. *Hamilton, Administrator, supra*, and *Judson* v. *Corcoran, supra*, and adds (page 638):

> "and they rest upon the rule that where one of two innocent parties, holding titles of equal apparent validity, must suffer through the fault of a third, that one must bear the loss who has put it in the power of the third to commit the fraud."

That is quite different from saying that the first assignee will lose, even though the second assignee, having made no inquiry, was not deceived by any want of notice and himself gave notice long after giving value for the assignment.

It is submitted that a rule whereby the right of a prior assignee, who has given no notice to the debtor, can be defeated by a second assignee, who makes inquiry of the debtor before taking his assignment, and takes such assignment in reliance upon the debtor's assurance that he has received notification of no previous assignments, offers adequate protection for later assignees; that this is the rule approved by your Honorable Court in the cases above cited; that an extension of this protection to the extent of making the validity of assignments arbitrarily dependent upon notice, regardless of the merits of the case, is in the nature of a recording act, and tantamount to judicial legislation; and that the cases of *Methven* v. *Staten Island Light, Heat and Power Co.* and *In re Leterman, Becher & Co., supra*, which establish such rule for the Second Circuit are not precedents binding upon the Circuit Court of Appeals for the First Circuit in our case, and are not well-founded or equitable decisions.

(*c*)

THE QUESTION IS ONE OF GREAT IMPORTANCE, AFFECTING THE RIGHTS OF ALL PERSONS TAKING ASSIGNMENTS OF CHOSES-IN-ACTION

It is a matter of common knowledge that a vast amount of the credit of the financial and commercial world is extended on the security of assignments of accounts receivable and other *choses-in-action*.

Before taking an assignment an assignee may make inquiry of the debtor as to prior assignments. If no notice has been given of any, he may feel safe in lending money on the security offered. But if he lends without inquiry, he has already taken his chance, and the giving of notice by him later cannot work an estoppel against a prior assignee. If effective at all, it must

be because of some arbitrary rule of law, making notice equivalent to the recording of a mortgage. If such rule exists, and is to be enforced in the Federal Courts, then it is the right of the business world to have a clear pronouncement of that rule by your Honorable Court; for mere denial of certiorari establishes no precedent. As said by your Honorable Court in *Hamilton Brown Shoe Co.* v. *Wolf Brothers, supra* (page 258):—

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ (certiorari) is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

The denial of certiorari in *Coleman & Co.* v. *Tawas Co., supra*, establishes no precedent against the granting of the writ in this case.

Hamilton Brown Shoe Co. v. *Wolf Brothers, supra.*

In *Coleman & Co.* v. *Tawas Co.*, the contracts of assignment were made after the case of *Methven* v. *Staten Island Light, Heat and Power Co., supra*, had been decided in the Circuit in which they were made and were to be carried out; whereas when the contracts in our case were made, the Massachusetts decisional rule stood unassailed. Furthermore, since the denial of the writ in *Coleman & Co.* v. *Tawas Co., supra*, the case of *Petition of National Discount Co., supra*, has arisen in the Sixth Circuit, causing a conflict in the Federal Courts. In *In re Leterman, Becher & Co.*, there was no dissenting opinion. In our case the dissenting opinion of Brown, J., covers fifteen pages, going through the cases exhaustively, and pointing out the necessity of the decision sought by your Petitioner.

CONCLUSION

Under the Massachusetts decisional rule it is clear that your Petitioner, being the first assignee in point of time, is entitled to the fund deposited with the Respondent, International Trust Co. We contend that the question of the effect of notice to the debtor is a question for the local law and that the Circuit

Court of Appeals for the First Circuit should have applied the Massachusetts rule. We further contend that even should it be found that the question is one of general jurisprudence and that the Federal Courts are not bound by the decisions of the State Court, nevertheless, there exists no Federal authority binding upon the Circuit Court of Appeals for the First Circuit to justify the establishment of the arbitrary rule applied by it in our case. On the contrary, the decisions of your Honorable Court favor the view contended for by your Petitioner.

We respectfully submit that the question involved is one of great importance, that the law on the subject is conflicting, and that the only method of finally determining the matter is for this Court to take jurisdiction by writ of certiorari.

Respectfully submitted

THE SALEM TRUST COMPANY

By

ALEXANDER WHITESIDE
HOWARD STOCKTON, JR.
RAYMOND P. BALDWIN
Counsel

Supreme Court of the United States

OCTOBER TERM, 1923

[No. 74]

SALEM TRUST COMPANY, PETITIONER

v.

MANUFACTURERS' FINANCE COMPANY ET AL., RESPONDENTS

BRIEF FOR MANUFACTURERS' FINANCE COMPANY

This is a bill in equity brought by the petitioner, a Massachusetts corporation, against the Manufacturers' Finance Company, a Delaware corporation, and the International Trust Company, a Massachusetts corporation, to establish the petitioner's right as against the Manufacturers' Finance Company to a certain fund on deposit with the International Trust Company.

The suit was originally brought in the Superior Court of Massachusetts but was removed to the United States District Court on the petition of Manufacturers' Finance Company on the ground of diverse citizenship, the International Trust Company being a mere nominal party to the proceeding. After the denial of a motion to remand (Record, p. 14) the case was tried in the District Court upon agreed facts (pp. 16–19).

The agreed facts show that on May 16, 1919 the Nelson Blower & Furnace Company (hereinafter called the Nelson Company), a Massachusetts corporation, assigned to the petitioner, for valid consideration, the indebtedness due and to become due the Nelson Company to the amount of $45,000 from the Murray & Tregurtha Corporation, also incorporated in Massachusetts, under a contract whereby the Nelson Company was to construct certain marine engines for the Murray & Tregurtha Corporation. On July 15, 1919 the Nelson Company assigned to the respondent Manufacturers' Finance Company (hereinafter called the Finance Company), for valid consideration, the same indebtedness to the amount of $40,000, and on September 20 the Nelson Company made another assignment of the same indebtedness to the Finance Company to the further amount of $10,000. On or about September 20 the Finance Company, having no knowledge of the prior assignment to the petitioner, duly notified the Murray & Tregurtha Corporation of the assignments to it. At that time the Murray & Tregurtha Corporation had not been notified of the assignment to the petitioner.

On September 26, 1919 the Nelson Company was placed in the hands of a receiver by a decree of the United States District Court in equity.

On October 6, 1919 the petitioner and the Nelson Company entered into an agreement (Exhibit No. 1, pp. 18–19) whereby the Nelson Company was to collect the assigned accounts and deposit the proceeds in the International Trust Company in the name of the Finance Company as trustee, the agreement providing that "if the parties hereto shall not be able to agree upon the ownership of the proceeds of any such account, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time."

When the suit was brought the amount on deposit in the International Trust Company was $7,963.36, which is less than the amounts advanced to the Nelson Company by the respective parties on the security of the assignments and still due them.

In the District Court it was held that the Finance Company was entitled to priority, although its assignment was later in time than that to the petitioner, because it was the first to give notice to the debtor (pp. 21–22), and a decree was accordingly entered dismissing the bill.

The decree was affirmed in the Circuit Court of Appeals, Brown, District Judge, dissenting (pp. 26–38).

The judges were unanimous in approving the refusal of the District Court to remand the case to the State Court.

I

The Motion to Remand was Properly Denied

The fact that the International Trust Company, which, like the plaintiff, is a Massachusetts corporation, was made a party defendant, did not prevent the removal of the case. It was in no sense a necessary party, as it had no concern whatever with the outcome of the controversy between the plaintiff and the Manufacturers' Finance Company. A final decree in favor of the plaintiff would naturally run against the Manufacturers' Finance Company only, requiring that company to draw a check on the account in favor of the plaintiff. The International Trust Company is a mere debtor of the Manufacturers' Finance Company, and the fact that the deposit stands in the name of the latter as trustee does not change the relation.

See *in re Nichols*, 166 Fed. 603 (D. C. N. Y.).
Minard v. *Watts*, 186 Fed. 245 (C. C. Kansas).
Fletcher v. *Sharp*, 108 Ind. 276.
Paul v. *Draper*, 158 Mo. 197.
Perry on Trusts, 6th Ed. § 122.

It is settled that the citizenship of a merely nominal party is immaterial upon the question of removability on the ground of diverse citizenship.

Walden v. *Skinner*, 101 U. S. 577.
Barney v. *Latham*, 103 U. S. 205.
Bacon v. *Rives*, 106 U. S. 99.
Ex parte Nebraska, 209 U. S. 436.

In *Bacon* v. *Rives*, it was claimed that the case could not be removed to the federal court because of the citizenship of one of the defendants who was an executor of a certain estate. The court said (at p. 104):

> "[The executors] were made defendants, not because of any connection they had with the main controversy, but to the end that [the testator's] interest in that estate might be reached and held, subject to such final decree as the complainants might obtain against him. Though made, formally, defendants, they occupied, substantially, the position of mere garnishees. Their citizenship was, consequently, immaterial. The necessary parties, on the respective sides of the controversy which is the foundation of the litigation, being citizens of different states, the relation of the executors to the suit was properly regarded as merely incidental."

Indispensable parties whose citizenship must be taken into consideration are those "who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Niles-Bement-Pond Company* v. *Iron Moulders' Union*, 254 U. S. 77, 80.

In the lower federal courts there are various cases resembling the present, in all of which it has been held that the non-resident defendant was entitled to removal.

New York Construction Company v. *Simon*, 53 Fed. 1 (C. C. Ohio).

Shattuck v. *North British Mercantile Insurance Company*, 58 Fed. 609 (C. C. A. 8th Circ.).
American National Bank v. *National Benefit & Casualty Company*, 70 Fed. 420 (C. C. Col.).
First National Bank v. *Bridgeport Trust Company*, 117 Fed. 969 (C. C. Conn.).
Harvey v. *Harvey*, 290 Fed. 653 (C. C. A. 7th Circ.).

II

The Bill was Properly Dismissed

The English rule as declared in *Dearle* v. *Hall*, 3 Russ. 1, and later cases, that as between two successive *bona fide* assignees of the same chose in action the second will prevail if he was the first to give notice to the debtor, is the rule of the federal courts; and as the question is one of general jurisprudence, the fact that the courts of Massachusetts do not follow the English rule is immaterial.

A. *The English Rule is the Rule of the Federal Courts*

That the party who first gives notice of his assignment is entitled to priority is, to use the words of the Circuit Court of Appeals in the present case, "the well established rule in the federal courts."

Judson v. *Corcoran*, 17 How. 612.
Spain v. *Hamilton's Administrator*, 1 Wall. 604.
Laclede Bank v. *Schuler*, 120 U. S. 511, 516.

In *Judson* v. *Corcoran* the court said (at p. 615):

> "There may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, . . . would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy. The cases of *Dearle* v. *Hall* and *Loveridge* v.

> *Cooper* . . . established the doctrine to the foregoing effect in England."

In the Spain case *Dearle* v. *Hall* was again expressly followed, the court saying (1 Wall. at p. 624):

> "In order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

The foregoing decisions have always been regarded as settling the question for the federal courts.

In *Farmers & Merchants Bank* v. *Farwell*, 58 Fed. 633, 637, 638 (C. C. A. 8th Circ.), the court said:

> "If, while he held possession of the policies and was prosecuting the actions upon them in his own name Frishman had assigned his claim against the companies to the bank or to a third person for value, and without notice of the prior assignment, and the subsequent assignee had first given notice to the Insurance Companies of his assignment, Farwell & Co. would have been estopped to claim the proceeds of the policies as against such an assignee. To this effect are *Dearle* v. *Hall*, *Spain* v. *Hamilton's Administrator* and *Judson* v. *Corcoran*. And they rest upon the rule that where one of two innocent parties, holding title of equal apparent validity must suffer through the fault of a third that one must bear the loss who has put it in the power of the third to commit the fraud."

In *Methven* v. *Staten Island Light Heat & Power Co.*, 66 Fed. 113 (C. C. A. 2d Circ.), the question was squarely presented whether a second assignee who gave notice should prevail over a prior assignee who did not. The court followed *Dearle* v. *Hall*, although the law of the state (New York) was conceded to be different.

> "As we understand the judgments of the Supreme Court of the United States in *Judson* v. *Corcoran*, 17 How. 612, and

Spain v. *Hamilton's Administrator*, 1 Wall. 604, they approve the doctrine of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*. . . . Whatever view we might otherwise be disposed to take of the question, we are concluded by the authority of these judgments. As the question is one of general jurisprudence, this court is not controlled by the decisions of the highest court of the state" (p. 115).

In *The Elmbank*, 72 Fed. 610, 616 (D. C. Cal.), is this statement:

"It may be conceded that the rule is as stated by counsel; that is, that, where there are two or more assignments from one person to several upon the same fund or debt, the assignee who first gives notice of his claim to the debtor or holder of the fund, the equities between the several assignees being otherwise equal, acquires the prior right to a satisfaction of his demand, although, as a matter of fact, his assignment is subsequent in point of time to that of other assignees."

In *Third National Bank* v. *Atlantic City*, 126 Fed. 413, 415 (C. C. N. J.), it was said:

"There has been much conflict of authority in the state courts with reference to the priority existing between successive assignees of the same fund—whether the one whose assignment is prior in time, or the one who first gives notice to the debtor, is entitled to be first paid—but so far as this court is concerned it feels itself concluded by the judgments rendered in the Supreme Court of the United States" in *Judson* v. *Corcoran* and *Spain* v. *Hamilton's Administrator*. (The decision of this case was reversed, on other grounds. See 130 Fed. 751.)

In *In re Hawley Down-Draft Furnace Co.*, 233 Fed. 451, 453 (D. C. Penn.; s. c. on appeal, 238 Fed. 122), the court said:

"Between two assignments of the same book accounts under otherwise like circumstances, the assignee who first gives notice to the debtor is first in right."

Finally, in *In re Leterman, Becher & Co., Inc.*, 260 Fed. 543, 547 (C. C. A. 2d Circ.), this language was used:

> "In *Methven* v. *Staten Island* . . . this court had before it the question whether an assignee who first gives notice to the debtor has the prior right though the assignment to him is later in date than that to the other assignee. The court held that as between two assignees the one who first gives notice has the better right. In so deciding this court declared that the question is one of general jurisprudence and that the decisions of the highest court of the state are not controlling. We adhere to that ruling in this case. . . . In this respect the rule in New York differs from the rule in the federal courts, and from that which prevails in England and in the courts in many of the states."

The case in the Sixth Circuit, *Petition of the National Discount Company*, 272 Fed. 570, relied upon by the petitioner, is not in point, as there the question was not between a prior and a subsequent assignee, but between a prior assignee and a subsequent trustee in bankruptcy. Similarly *Greey* v. *Dockendorff*, 231 U. S. 513, is not pertinent, as there again the question was merely whether an assignment was good as against a trustee in bankruptcy. Indeed Mr. Justice Holmes stressed this point, saying:

> "Notice to the debtors was not necessary to the validity of the assignment *as against creditors.*" (Italics ours.)

That the English rule is the rule of the federal courts has been universally assumed and stated by other courts and by text writers. See, for example:

Fortunato v. *Patten*, 147 N. Y. 277, 283.
Graham Paper Co. v. *Pembroke*, 124 Cal. 117, 120, 121.
Lambert v. *Morgan*, 110 Md. 1, 26, 27.
Enochs-Havis Lumber Co. v. *Newcomb*, 79 Miss. 462, 467.
Jenkinson v. *New York Finance Co.*, 79 N. J. Eq. 247, 260.

Jack v. *National Bank of Wichita*, 17 Okla. 430, 435.
Phillips's Estate, 205 Pa. 515, 521.
Coffman v. *Liggett*, 107 Va. 418, 422.
Pomeroy, Eq. Juris., 4th Ed. §695, Note J.
66 L. R. A. 761.
5 Corp. Jur. 953.
19 Yale Law Journal, 258, 263.
60 Univ. of Penna. Law Rev. 668, 669.

Judge Brown's suggestion that the rule applies only when the second assignee has made inquiry and been in fact misled by the failure of the first assignee to give notice, in other words, to cases where an estoppel can be made out, does not find support in the authorities.

In *Dearle* v. *Hall* itself the rule appears to have been rested upon the theory that the giving of notice is analogous to a taking of possession (see the language of Lord Chancellor Lindhurst, 3 Russ. at p. 58), and it is not suggested that there must have been inquiry by the second assignee.

In *Foster* v. *Cockerell*, 3 Cl. & Fin. 456, a House of Lords decision approving and following *Dearle* v. *Hall*, a second assignee who had made no inquiry was preferred, and no mention of inquiry was made in the opinion.

In *Meux* v. *Bell*, 1 Hare, 73, this question was elaborately discussed and it was concluded that inquiry was not a necessary element to recovery.

See Story, Equity Jurisprudence, §1384.

In the federal courts, and in the state courts which follow *Dearle* v. *Hall*, the rule is stated and applied without being limited to cases where the second assignee made inquiry or was in fact misled. See the cases and text writers above cited, and also

Lambert v. *Morgan*, 110 Md. 1.
Scott's Cases on Trusts, p. 623.

In the courts below, the petitioner was unable to refer to any case, decided by any court which purports to follow *Dearle* v. *Hall*, in which the first assignee has been preferred on the ground of the absence of inquiry by the second assignee.

B. *The Question is one of General Jurisprudence.*

The decision of the Circuit Court of Appeals in this case, applying the federal rule in spite of the fact that the Massachusetts courts do not recognize this rule, follows the decisions of the Circuit Court of Appeals of the Second Circuit in which the rule applied in the New York state courts was similarly disregarded.

Methven v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113.

In re Leterman, Becher & Co., Inc., 260 Fed. 543.

There are no decisions to the contrary, and no suggestion has been found in any of the federal cases that the question is one upon which the federal courts are bound to follow state decisions.

In both *Judson* v. *Corcoran*, *supra*, and *Spain* v. *Hamilton's Administrator*, *supra*, the question was obviously dealt with by this court as one of general jurisprudence; and the mere fact that for many years the "federal rule" on the subject has been constantly referred to and recognized by courts and text-writers indicates the opinion of the profession that it is such a question.

It is of course true, as Judge Brown says in his dissenting opinion (p. 29), that "the jurisdiction which a state possesses over property within its borders extends alike to tangible and intangible property" and that "a vested right of action is property in the same sense in which tangible things are property," but it by no means follows that a state court, in drawing one conclusion or another

with respect to the equitable principles applicable to the rights of successive assignees of a chose in action, there being no statute on the subject, is establishing a local "rule of property" in the sense in which that phrase is used in the classification of decisions which are binding on the federal courts.

The application of the 34th section of the Judiciary Act of 1789 is limited "to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

Swift v. *Tyson*, 16 Pet. 1, 18.

The rights of owners of choses in action have been constantly dealt with by the federal courts as matters of "general jurisprudence."

The question whether a transferee of a negotiable instrument is entitled to rank as a holder of value is such a question.

Swift v. *Tyson*, 16 Pet. 1.
Oates v. *National Bank*, 100 U. S. 239.
Railroad Company v. *National Bank*, 102 U.S. 14.

So the right of a purchaser of municipal bonds to rely upon recitals therein is a question of general jurisprudence.

Presidio County v. *Noel-Young Bond Company*, 212 U. S. 58.

State decisions are not binding upon the question of the validity of the assignment of an insurance policy.

Russell v. *Grigsby*, 168 Fed. 577 (C. C. A. 6th Circ.) (decision reversed on another ground, 222 U. S. 149).
New York Life Insurance Company v. *Dunlevy*, 214 Fed. 1, 5 (C. C. A. 9th Circ.).

Nor upon the question whether the right to dissolve is waived in a bank passes to the bank in the absence of agreement.

In re Farmers Security, 289 Fed. 108 (C. C. A. 2d Cir.), and see

In re Governor Bleasing Company, 266 Fed. 610 (D. C. Ala., affirmed by C. C. A. 277 Fed. 1015).

Nor upon the question whether an instrument purporting to effect an absolute transfer of title may be shown to have been intended as security only.

Russell v. *Southard*, 12 How. 139.

Nor as to the rights of a holder of an insurance policy issued before the payment of the first premium.

MacKelvie v. *Mutual Benefit Life Insurance Company*, 287 Fed. 660 (C. C. A. 2d Cir.).

It is submitted that Judge Brown also draws an unwarrantable conclusion from the statement of this court in earlier cases that "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement" (p. 29).

It does not follow that in determining what those laws are the decisions of the state courts must be treated as conclusive in the federal courts.

See *Aetna Life Insurance Company* v. *Moore*, 231 U. S. 543, 559.

Myrick v. *Michigan Central Railroad*, 107 U. S. 102.

Harper v. *Hochstim*, 278 Fed. 102 (C. C. A. 2d Cir.).

Johnson v. *Charles D. Norton Company*, 159 Fed. 361 (C. C. A. 6th Cir.).

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No. [redacted]74

Supreme Court of the United States

OCTOBER TERM, 1922

No.

THE SALEM TRUST COMPANY,
PETITIONER

v.

MANUFACTURERS' FINANCE COMPANY ET AL.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT G. DODGE,
LAURENCE CURTIS 2d,
Counsel

PRESS OF GEO. H. ELLIS CO. (INC.) BOSTON

Supreme Court of the United States

OCTOBER TERM, 1922

[ ]

THE SALEM TRUST COMPANY, PETITIONER

v.

MANUFACTURERS' FINANCE COMPANY ET AL., RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The Nelson Blower & Furnace Company, a Massachusetts corporation, first assigned certain accounts receivable to the petitioner, The Salem Trust Company, also a Massachusetts corporation, and later assigned the same accounts to the respondent, the Manufacturers' Finance Company, a Delaware corporation, a purchaser in good faith and for value without knowledge of the earlier assignment. The respondent first gave notice of the assignment to the debtor. The Nelson Blower & Furnace Company becoming financially embarrassed, a dispute arose between the petitioner and respondent as to whose assignment should prevail. By mutual agreement the assigned accounts were collected and placed in the hands

of the International Trust Company pending settlement of the dispute. Petitioner sued respondent and the International Trust Company in the Massachusetts Court. At the motion of respondent the suit was removed to the United States District Court for the District of Massachusetts on the ground that the International Trust Company was a nominal party only, and on the ground of the diversity of citizenship between petitioner and respondent. The District Court held that the respondent (the subsequent assignee who first gave notice) should have priority. That decision was affirmed by the Circuit Court of Appeals for the First Circuit, Judge Brown dissenting, 280 Fed. 803 (1922), and the case is here on petition for *certiorari*.

ARGUMENT.

It is submitted that no such issues are here involved as should justify an appeal to this extraordinary jurisdiction.

Two questions are presented,—the question of removal, and the question as to who should prevail as between a subsequent assignee first giving notice (the respondent) and a prior assignee.

As to removal, without reviewing in detail the reasons which have impelled three courts to judge it proper, it may be suggested that no such fundamental question is in issue as would warrant this court in intervening on *certiorari*.

As to the question who should prevail as between a subsequent assignee first giving notice (the respondent) and a prior assignee, this of course is the question decided in the celebrated English case of *Dearle* v. *Hall*, 3 Russ. 1 (1828), in favor of the subsequent assignee first giving notice.

THE DOCTRINE OF *DEARLE* V. *HALL* IS (TO USE THE WORDS OF THE CIRCUIT COURT OF APPEALS IN THE PRESENT CASE) "THE WELL-ESTABLISHED RULE OF THE FEDERAL COURTS."

In *Judson* v. *Corcoran*, 17 How. (U. S.) 612 (1854), the subsequent assignee first giving notice was preferred to the prior assignee, the court at page 615 referring specifically to *Dearle* v. *Hall*.

In *Spain* v. *Hamilton's Administrator*, 1 Wall. (U. S.) 604 (1863), the court said at page 623: "This case has been examined by us very fully. . . . We think it to be clearly within the principles decided by this court in *Judson* v. *Corcoran*. It is clearly within the cases which

have been so fully and ably reported of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*."

In *Methven* v. *Staten Island, etc., Co.*, 66 Fed. 113 (C. C. A. 2d Circ.) (1895), the court said at page 115: "As we understand the judgments of the Supreme Court of the United States in *Judson* v. *Corcoran* . . . and *Spain* v. *Hamilton's Administrator* . . . they approve the doctrine of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*."

The Elmbank, 72 Fed. 610 (D. C. Cal.) (1896).

Third National Bank v. *Atlantic City*, 126 Fed. 413 (C. C. N. J.) (1903).

In re Leterman, Becher & Co., 260 Fed. 543 (C. C. A. 2d Circ.) (1919).

See *Farmers & Merchants Bank* v. *Farwell*, 58 Fed. 633, 637 (C. C. A. 8th Circ.) (1893).

In re Hawley, etc., Co., 233 Fed. 451, 453 (D. C. Penn.) (1916).

That the doctrine of *Dearle* v. *Hall* is the rule of the Federal Courts has been universally assumed and stated by other courts and by text-writers. See, for example:—

Fortunato v. *Patten*, 147 N. Y. 277, 283.

Graham Paper Co. v. *Pembroke*, 124 Cal. 117, 120, 121.

Lambert v. *Morgan*, 110 Md. 1, 26, 27.

Enochs-Haris Lumber Co. v. *Newcomb*, 79 Miss. 462, 467.

Jenkinson v. *New York Finance Co.*, 79 N. J. Eq. 247, 260.

Jack v. *National Bank of Wichita*, 17 Okla. 430, 435.

Coffman v. *Liggett*, 107 Va. 418, 422.

Pomeroy, Eq. Juris., 4th Ed. § 695, Note J.

66 L. R. A. 761.

5 Corp. Jur. 953.

19 Yale Law Journal, 258, 263.

60 Univ. of Penna. Law Rev. 668, 669.

The case in the Sixth Circuit, *Petition of the National Discount Co.*, 272 Fed. 570 (1921), referred to on page 14 of petitioner's brief, is not in point, as there the question was not between a prior and a subsequent assignee, but between a prior assignee and a subsequent trustee in bankruptcy. There is a well-recognized difference between these cases as pointed out by Professor Scott, who says:—

> "An assignee of an equitable interest or chose in action, according to the weight of authority even in jurisdictions which follow *Dearle* v. *Hall*, is preferred to a subsequent attaching or garnishing creditor, although the assignee has not given to the obligor notice of the assignment. *Third Nat. Bk.* v. *Atlantic City*, 126 Fed. 413; *Steltzer* v. *Condon*, 139 Iowa, 754; *Phillip's Est.*, 205 Pa. 525; Ames, 413; Pomeroy, Eq. Juris. § 694; Dec. Dig., Assignments, 86; 5 Corp. Jur. 972." (Scott, "Cases on Trusts," page 623.)

The case of *Grecy* v. *Dockendorff*, 231 U. S. 513 (1913), referred to on page 19 of petitioner's brief, is likewise not in point for the same reason. Indeed Mr. Justice Holmes stressed the distinction, saying, "Notice to the debtor was not necessary to the validity of the assignment *as against creditors*." (Italics ours.)

BUT IT IS CONTENDED BY THE PETITIONER THAT THE FEDERAL COURT SHOULD HERE APPLY THE MASSACHUSETTS RULE, WHICH IS ALLEGED TO BE DIFFERENT. HOWEVER, IT IS FUNDAMENTAL THAT ON QUESTIONS OF GENERAL COMMERCIAL LAW OR OF GENERAL JURISPRUDENCE A FEDERAL COURT WILL NOT FEEL BOUND BY THE DECISIONS OF THE STATE COURT.

Swift v. *Tyson*, 16 Pet. (U. S.) 1 (1842), and cases following it.
Foster Federal Practice, § 477.

The extract from Professor Beale quoted on page 12 of petitioner's brief well expounds this doctrine: "In such cases the Federal Court is declaring the law of the state, but declines to accept as binding a prior declaration of the law by the state."

AND THE QUESTION OF PRIORITY AS BETWEEN RIVAL ASSIGNEES IS SUCH A QUESTION.

In *Methven* v. *Staten Island, etc., Co.*, 66 Fed. 113 (C. C. A. 2d Circ.) (1895), there was an appeal from the Circuit Court of the United States for the Southern District of New York. The court stated that New York did not follow the doctrine of *Dearle* v. *Hall*, that in its understanding the Supreme Court of the United States did, and then it said, at page 115:—

> "Whatever view we might otherwise be disposed to take of the question, we are concluded by the authority of these judgments. *As the question is one of general jurisprudence, this court is not controlled by the decision of the highest court of the state.*" (Italics ours.)

See also *In re Leterman, Becher & Co.*, 260 Fed. 543 (C. C. A. 2d Circ.) (1919).

INQUIRY BY THE SECOND ASSIGNEE IS NOT NECESSARY.

Judge Brown's suggestion (in his dissenting opinion below) and petitioner's argument that the rule does not apply in favor of a second assignee who did not make inquiry, have failed to receive support. Inquiry has not been considered a necessary element to recovery.

In *Foster* v. *Cockerell*, 3 Cl. & Fin. 456 (1835), a House of Lords case laying down the law of England for all time unless changed by act of Parliament, *Dearle* v. *Hall*

was referred to and the rule was applied in favor of a second assignee who had made no inquiry. Indeed no mention of inquiry was made in the opinion.

In *Meux* v. *Bell*, 1 Hare, 73 (1841), this very question was elaborately discussed and it was concluded that inquiry was not a necessary element to recovery. It was pointed out that notice is itself inquiry.

Petitioner's brief does not disclose a single case in which recovery has been denied on the ground of the absence of such inquiry.

CERTIORARI HAS BEEN DENIED IN A SIMILAR CASE.

In conclusion, it may be pointed out that this court has already denied a petition for *certiorari* in a case on all fours with the present case. *In re Leterman, Becher & Co.*, 260 Fed. 543 (C. C. A. 2d Circ.) (1919), was an appeal from the District Court of the United States for the Southern District of New York involving rival assignees. As here, it was contended that the New York rule which was said not to follow *Dearle* v. *Hall* should be applied, but as here, the Federal Court applied the doctrine of *Dearle* v. *Hall* on the ground that it was the Federal rule, and that this was a question of general law as to which the Federal Courts were not bound by state decisions. Furthermore this also was a case in which the second assignee had made no inquiry. Petition was made to this court for *certiorari* and was denied under the name of *Coleman & Co.* v. *Tawas Co.*, 250 U. S. 668 (1919).

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OCT 5 1923
WM. R. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1923

No. 74

SALEM TRUST COMPANY,
Appellant

v.

MANUFACTURERS' FINANCE COMPANY

AND

INTERNATIONAL TRUST COMPANY
Appellees

BRIEF FOR APPELLANT

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SUBJECT INDEX

	PAGE
TABLE OF CASES AND STATUTES	ii
STATEMENT OF CASE	1
FACTS	2
SPECIFICATION OF ERRORS	5
QUESTIONS	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONCLUSION	37

TABLE OF CASES

PAGE

American Brake Shoe & Foundry Co. v. *New York Railways Co.*, 278 Fed. 842 31
American Trading Co. v. *Steele*, 274 Fed. 774 (C. C. A. 9th Circ.) 33
Anderson v. *Gray*, 284 Fed. 770 (C. C. A. 5th Circ.) 31
Atherton v. *Beaman*, 264 Fed. 878 (C. C. A. 1st Circ.) . . . 30
Atherton, J. M. Co. v. *Ives*, 20 Fed. 894 31
Bacon v. *Northwestern Life Insurance Co.*, 131 U. S. 258 . . 32
Bailey v. *Baker Ice Machine Co.*, 239 U. S. 268 30
Balkam v. *Woodstock Iron Co.*, 154 U. S. 177 32
Barnes v. *Alexander*, 232 U. S. 117 30
Beale's Cases on Conflict of Laws (1902 Ed.), Summary . . 15
Benedict, Receiver v. *Aaron Ratner*, 259 U. S. 579 . . . . 35, 36
Berlet v. *Lehigh Valley Silk Mills*, 287 Fed. 769 (C. C. A. 3d Circ.) 30
Black's Law of Judicial Precedents, Sec. 149 17
Brant v. *Swofford Bros.*, 214 U. S. 279 30
Brown v. *Grand Rapids Parlor Furniture Co.*, 58 Fed. 286 (C. C. A. 6th Circ.) 30
Bucher v. *Cheshire R.R. Co.*, 125 U. S. 555 32
Clarke v. *Clarke*, 178 U. S. 186 31
Coleman & Co. v. *Tawas & Co.*, 250 U. S. 668 34
Commonwealth S.S. Co. v. *American Shipbuilding Co.*, 197 Fed. 780 31
5 Corpus Juris, 971-973 36
Crampton v. *Lautz Bros. & Co. Inc.*, 274 Fed. 743 33
Dale v. *Pattison*, 234 U. S. 399 30
Davis v. *Mills*, 99 Fed. 39 31
Dearle v. *Hall*, 3 Russ. 1 . . . . . 22, 24, 25
DeVaughn v. *Hutchinson*, 165 U. S. 566 31
Dennick v. *Railroad Co.*, 103 U. S. 11 32

PAGE

Detroit v. *Osborne*, 135 U. S. 492 32
Dixon, Joseph Crucible Co. v. *Paul*, 167 Fed. 784 (C. C. A. 6th Circ.) 30
Dooley v. *Pease*, 180 U. S. 126 30
East Central Eureka Mining Co. v. *Central Eureka*, 204 U. S. 266 31
Easton v. *Houston & T. C. Ry. Co.*, 32 Fed. 893 32
Etheridge v. *Sperry*, 139 U. S. 266 30
Fargason, J. T. v. *Furst*, 287 Fed. 306 (C. C. A. 8th Circ.) . 32
Farmers and Merchants Bank v. *Farwell*, 58 Fed. 633 (C. C. A. 8th Circ.) 22
First National Bank of Evanston v. *Bank of Waynesboro*, 262 Fed. 754 (C. C. A. 8th Circ.) 30
Forsyth v. *Hammond*, 166 U. S. 506 32
Fortunato v. *Patten*, 147 N. Y. 277 11
Foster v. *Cockerell*, 3 Cl. & F. 456 . . . . . 22, 24, 25
Greey v. *Dockendorff*, 231 U. S. 513 . . . . . 10, 26, 36
Hamilton v. *David C. Beggs Co.*, 179 Fed. 949 31
Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U. S. 251 . . . 34
Hartford Fire Insurance Co. v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91 32
Herman v. *Conn. Mutual Life Insurance Co.*, 218 Mass. 181 . 14
Highland Park Mfg. Co. v. *Steele*, 232 Fed. 10 (C. C. A. 4th Circ.) 31
Hiscock v. *Varick Bank of New York*, 206 U. S. 28 30
Horn Silver Mining Co. v. *N. Y.*, 143 U. S. 305 15
Humphrey v. *Tatman*, 198 U. S. 91 30
In re Ames, 283 Fed. 465 30
In re American Steel Supply Syndicate, 256 Fed. 876 31
In re Ballard, 279 Fed. 574 31
In re Codman, 284 Fed. 273 33
In re Hawley Down-Draft Furnace Co., 233 Fed. 451 . . . 23, 24
In re Hawley Down-Draft Furnace Co., 238 Fed. 122 (C. C. A. 3d Circ.) 11, 24, 30
In re Hub Carpet Co., 282 Fed. 12 (C. C. A. 2d Circ.) . . 30, 35
In re Jarnol, 283 Fed. 547 32
In re Leterman, Becher & Co., 260 Fed. 543 . . . . 19, 29, 34, 35
In re Nader, 276 Fed. 123 31
Irwin v. *Maple*, 252 Fed. 10 (C. C. A. 6th Circ.) 32

PAGE

Joseph Dixon Crucible Co. v. *Paul*, 167 Fed. 784 (C. C. A. 6th Circ.) 30
Judson v. *Corcoran*, 17 How. 612 20
Klinger v. *Hyman*, 223 Fed. 257 (C. C. A. 2d Circ.) 30
Knapp, Stout & Co. v. *McCaffrey*, 177 U. S. 638 30
Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349 31
Laclede Bank v. *Schuler*, 120 U. S. 511 21
Lewis v. *Herrera*, 208 U. S. 309 32
Lloyd v. *Fulton*, 91 U. S. 479 31
Loveridge v. *Cooper*, 3 Russ. 30 . . . . . 24, 25
Lubriko Co. v. *Wyman*, 290 Fed. 12 (C. C. A. 3d Circ.) . . . 33
Methven v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113 . . . . . 19, 29, 35
Midway Irrigation Co. v. *Snake Creek*, 271 Fed. 157 (C. C. A. 8th Circ.) 31
Miller v. *Ammon*, 145 U. S. 421 32
Missouri, Kansas, etc., Trust Co. v. *Krumseig*, 127 U. S. 351 . 32
Mutual Development Co. v. *Kentucky Coal Lands Co.*, 285 Fed. 761 31
McMullen v. *Zabawski*, 283 Fed. 552 31
Nichols v. *Atchison, Topeka & Santa Fe Ry.*, 286 Fed. 1 (C. C. A. 9th Circ.) 32
Percy Summer Club v. *Astle*, 163 Fed. 1 (C. C. A. 1st Circ.) . 31
Petition of National Discount Company, 272 Fed. 570 . . . 11, 27
Pickens v. *Merriam*, 274 Fed. 1 (C. C. A. 9th Circ.) 31
Putnam v. *Story*, 132 Mass. 205 . . . . . 10, 14
Rabinowitz v. *People's Nat'l Bank*, 235 Mass. 102 14
Railroad Co. v. *Georgia*, 98 U. S. 359 32
Randolph v. *Quidnick Co.*, 135 U. S. 457 30
Sanduski Cement Co. v. *A. R. Hamilton & Co.*, 273 Fed. 596. 32
Schreyer v. Scott, 134 U. S. 405 31
Sexton v. *Kessler*, 225 U. S. 90 30
Shaffer v. *Carter*, 252 U. S. 37 15
Snare & Triest Co. v. *Friedman*, 169 Fed. 1 (C. C. A. 3d Circ.) 32
Spain v. *Hamilton's Administrator*, 1 Wall. 604 . . . . . 20, 21
Sturtevant, B. F. Co. v. *Fidelity & Deposit Co. of Maryland*, 285 Fed. 367 (C. C. A. 2d Circ.) 33
Taney v. *Penn Bank*, 232 U. S. 174 30
Thayer v. *Daniels*, 113 Mass. 129 . . . . . 11, 14

PAGE

The Elmbank, 72 Fed. 610 . . . . . 22, 23
Theological Seminary v. *Illinois*, 118 U. S. 662 32
Third National Bank of Atlantic City, 126 Fed. 413 23
Third National Bank of Atlantic City, 130 Fed. 751 23
Thompson v. *Fairbanks*, 196 U. S. 516 30
Townsend v. *Todd*, 91 U. S. 452 32
Triumph Electric Co. v. *Patterson*, 211 Fed. 244 (C. C. A. 8th Circ.) 30
Union Trust Co. v. *Bulkley*, 150 Fed. 510 (C. C. A. 6th Circ.) 30
Warburton v. *White*, 176 U. S. 484 32
Ward v. *Duncombe*, 1893 A. C. 369 25
Wells v. *Brown*, 255 Fed. 852 (C. C. A. 8th Circ.) 31
Whitaker v. *McBride*, 197 U. S. 510 31
York Mfg. Co. v. *Cassell*, 201 U. S. 344 32

STATUTES

PAGE

General Laws of Massachusetts, C. 231, sec. 5 11
Revised Laws of Massachusetts, C. 173, sec. 4 11

Supreme Court of the United States

OCTOBER TERM, 1923

No. 74

THE SALEM TRUST COMPANY, *Appellant*

v.

MANUFACTURERS' FINANCE COMPANY

AND

INTERNATIONAL TRUST COMPANY, *Appellees*

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This case comes before this Court upon a writ of certiorari granted October 26, 1922, to review a decision of the Circuit Court of Appeals for the First Circuit rendered April 11, 1922. The questions presented are:—

1. Whether the proceeding was erroneously removed from the Superior Court of the Commonwealth of Massachusetts to the District Court of the United States for the District of Massachusetts:—

   (*a*) because of the fact that the money which was the subject of controversy in the proceeding was in the International Trust Company of Boston, a citizen of Massachusetts, in a special deposit standing in the name of the Appellee as Trustee under an agreement that it should be so held pending the determination

by a court of competent jurisdiction of the question as to which of the parties was entitled to the money; (*b*) because of the fact that under the terms of the agreement by which the money was held, the Appellant had the right to sue in the State Court of Massachusetts.

2. The priority of the rights of successive assignees of the same account receivable, both assignments being for value, the later assignee taking its assignment without inquiry of the debtor and without notice to the debtor until long after the date of the assignment, its notice given then being prior to that of the earlier assignee.

FACTS

The Appellant, a trust company organized under the laws of Massachusetts, on May 16, 1919, lent a large sum of money to the Nelson Blower & Furnace Company, a Massachusetts corporation, receiving as security, an assignment by the Nelson Blower & Furnace Company, of accounts receivable owed to it by the Murray & Tregurtha Corporation, also a Massachusetts corporation. The three parties concerned in this assignment were all citizens of Massachusetts, and the money owing was to be paid in Massachusetts (Record, pp. 16, 17 and 29).

Subsequently, namely, on or about July 15, 1919, the Nelson Blower & Furnace Company borrowed a large sum of money from the Appellee, Manufacturers' Finance Company, a Delaware corporation, but one having a usual place of business in Boston, Massachusetts, being permitted, after compliance with the Massachusetts laws, to do business in Massachusetts, and as security, assigned to said Appellee the same accounts previously assigned to the Appellant. Said Appellee took the assignment without, so far as appears, inquiring of the Murray & Tregurtha Corporation as to whether notice had been given to it of any previous assign-

ment, and without, so far as appears, relying upon any knowledge except that furnished by the assignor or in any way being influenced in its conduct by the failure of the Appellant to give notice of its assignment to the Murray & Tregurtha Corporation (Record, pp. 16, 17 and 32).

On or about September 20, 1919, about one week before the Nelson Blower & Furnace Company was placed in the hands of a receiver, the Manufacturers' Finance Company notified the Murray & Tregurtha Corporation of the assignment made to it, of the accounts receivable (Record, p. 16).

The rival assignees agreed with each other that the Nelson Blower & Furnace Company, acting by its receiver, should finish the work being done for the Murray & Tregurtha Corporation, and that the net proceeds, amounting to $7,963.36 (less than the amount of the claim of either assignee), should be deposited in the Appellee, International Trust Company (a Massachusetts corporation having a usual place of business in Boston, Massachusetts), in a special deposit standing in the name of the Manufacturers' Finance Company, as trustee, pending the determination by a Court of competent jurisdiction of the question as to which assignee was entitled to such proceeds (Record, pp. 17–19).

The agreement between the Appellant and the Manufacturers' Finance Company, Appellee, by which the latter was given authority to collect the accounts assigned and hold the proceeds as Trustee pending a determination of the rights of the two parties therein, appears on pages 18 and 19 of the Record.

The clause of that agreement relative to the disposition of the proceeds reads as follows:—

> "6. If the parties hereto shall not be able to agree upon the ownership of the proceeds of any of such accounts, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which pro-

ceeding or proceedings may be brought by either party hereto at any time" (Record, p. 19).

In accordance with the agreement, the Appellant brought a Bill in Equity in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, against the Manufacturers' Finance Company and the International Trust Company, and the Manufacturers' Finance Company filed a Motion that the suit should be removed to the District Court of the United States for the District of Massachusetts, and against the objection of the Appellant, the suit was so removed. It was heard by Anderson, J., and dismissed by a Final Decree entered May 6, 1921 (Record, pp. 1-3, 8, 9, 14 and 20).

Thereafter, upon appeal by the Appellant, the United States Circuit Court of Appeals for the First Circuit, by a decision handed down on April 11, 1922, affirmed the decree of the District Court with costs to the Manufacturers' Finance Company, Appellee (Record, pp. 26-28 and 39). A dissenting opinion was rendered by Brown, J. (Record, pp. 28-38).

On June 6, 1922, the Appellant represented that it intended to file a petition to this Court for a writ of certiorari and moved that the issue of the mandate be stayed, and having subsequently complied with the rules and regulations of the Court, and filed in this Court a petition for certiorari, that petition was granted October 26, 1922 (Record, pp. 39-41).

It clearly appears in the proceedings, and has not been denied, that the parties to the first assignment were both citizens of Massachusetts, that the debtor owing the accounts assigned was a citizen of Massachusetts, that the assignment was made in Massachusetts, and that the money owed was payable in Massachusetts. It further appears that the second assignment was made in Massachusetts, by a citizen of Massachusetts, of an account owed by a citizen of Massachusetts, and payable in Massachusetts,

but that the assignee was a citizen of Delaware (a corporation actually having a place of business in Massachusetts, having complied with the laws of Massachusetts, permitting it to do business therein).

SPECIFICATION OF ERRORS RELIED UPON

The Appellant relies upon the following assignments of errors:—

1. That the Court erred in dismissing the complaint.
2. That the Court erred in refusing to rule that, upon all the evidence, the plaintiff is entitled to the relief prayed for in its bill.
3. That the Court erred in holding, in substance, that the Federal rule with respect to priority of claim as between successive assignees of the same non-negotiable chose in action, is the English rule, so-called; and that there must consequently be a decree for the defendant Manufacturers' Finance Company.
4. That the Court erred in refusing to rule that, the assignment to the plaintiff being prior in point of time to those to the Manufacturers' Finance Company, the plaintiff is entitled to recover the amount on deposit in the defendant International Trust Company by virtue of the provisions of the agreement, Exhibit 1, annexed to the agreed facts.
5. The Court erred in refusing to rule that the Nelson Blower & Furnace Company having sold all its interest, to the extent of $45,000, in payments due and to become due it under its contract with the Murray & Tregurtha Corporation to build thirty marine engines, had no interest therein left to assign to the Manufacturers' Finance Company on July 21 and September 20, 1919, unless it was the excess, if any, of the amount due or to become due said Nelson Company over the above said $45,000.
6. That the Court erred in refusing to rule that upon all the evidence the defendant International Trust

Company is an indispensable party to this suit, and that, inasmuch as it is a resident and citizen of Massachusetts, the District Court acquired no jurisdiction of this cause.

7. That the Court erred in refusing to remand said cause to the State Court (Record, pp. 22, 23).

QUESTIONS

I. Was the proceeding erroneously removed from the Massachusetts Court to the United States Court?

II. Which assignee has the prior claim to the proceeds of the assigned accounts?

SUMMARY OF ARGUMENT.

The Appellant contends:—

I. That the case was erroneously removed:—

(*a*) because the International Trust Company was an indispensable party;

(*b*) because the Appellee, the Manufacturers' Finance Company, had by agreement precluded itself from asking to have it removed.

II. That the Appellant, being the prior assignee, has the prior claim to the proceeds of the assigned accounts:—

(*a*) because the first assignee should have priority unless for some reason it is estopped, and in this case there is no estoppel;

(*b*) because the claim of the later assignee is based not on estoppel but on mere priority of notice, and should not prevail;

(*c*) because there are no precedents binding on this Court in favor of the second assignee, and the Federal decisions relied on by the majority of the Circuit Court of Appeals do not justify this Court in deciding in favor of the second assignee;

(*d*) because the Massachusetts State law is in favor of the first assignee, and in this case local law should be followed by the Federal Court.

ARGUMENT

I

WAS THE PROCEEDING ERRONEOUSLY REMOVED FROM THE MASSACHUSETTS COURT TO THE UNITED STATES COURT?

The Appellant contends it *was* erroneously removed:—

(*a*) because the International Trust Company was an indispensable party;

(*b*) because the Appellee, the Manufacturers' Finance Company, had by agreement, precluded itself from asking to have it removed.

(*a*) The Appellant in its sixth Assignment of Errors states in substance that the Court erred in refusing to rule that the International Trust Company, Appellee, was an indispensable party. A reference to the agreement dated October 6, 1919, between the Manufacturers' Finance Company, Appellee, and the Appellant (Record, pp. 18 and 19) discloses the fact that by Article 1 it was provided that all proceeds of assigned accounts collected by the Finance Company should be deposited "in the International Trust Company of Boston, in a special account in the name of the first party as Trustee, there to remain subject to the terms hereof and for the purposes hereof." The trust *res*, therefore, is the debt the Trust Company owes to the Finance Company as Trustee under this agreement, and in any proceeding to collect this debt the Trust Company (a citizen of Massachusetts) would be an indispensable party. At present the Trust Company cannot honor any check drawn upon it, because, having full knowledge of the facts, it knows the claim against it is held by the Finance

Company as Trustee under the terms of said agreement and for the purposes thereof, and that the money can be withdrawn only upon agreement of both parties to that agreement or upon final decree of some Court of competent jurisdiction. The present suit was brought by the Appellant in a court of competent jurisdiction not only to determine its rights, but to collect the debt. See the Bill of Complaint (Record, pp. 2 4), and particularly the first Prayer of the Bill, which reads "1. That its right to said fund may be established and that the defendants may be ordered to deliver and pay the same to the plaintiff."

The Trust Company was therefore made a party for the purpose of collection and for that purpose must be an indispensable party. If a final decree were to be rendered in favor of the Appellant, it should therefore not only order the Finance Company to draw a check on the deposit in favor of the Appellant, but also should order the Trust Company to honor the check.

(*b*) The Appellant's seventh Assignment of Errors reads as follows: "That the Court erred in refusing to remand said cause to the State Court."

A reference to Article 6 of the agreement dated October 6, 1919, between the Finance Company and the Appellant (Record, p. 19) shows that it was provided that after the Finance Company had collected the assigned accounts and had deposited the proceeds in the International Trust Company of Boston, in a special account in its name as Trustee in accordance with Article 1 of that agreement, the question of the ownership of the proceeds, if the two parties should be unable to agree on the same, should be determined "by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time."

Does this not amount to an agreement on the part of

the Finance Company that the Appellant might bring a proceeding in *any* Court of competent jurisdiction?

There is no question that the Superior Court for the County of Suffolk and Commonwealth of Massachusetts was a Court of competent jurisdiction because the Record discloses and the Finance Company itself admits in the agreement, that while it was a Delaware corporation, it had an office in Boston (Record, p. 18).

While the Appellant is aware that this Court has held that an agreement not to remove a case to the Federal Courts is void, and a Statute requiring such an agreement is unconstitutional, yet it seems to the Appellant that it does not necessarily follow that an agreement that a party may bring and prosecute an action in a State Court is not valid and enforceable where based on adequate consideration. The particular agreement made between the Appellant and the Finance Company (Record, pp. 18 and 19) shows that the parties reached an agreement for what seemed to them a practical method for completing the work which should make the assigned accounts payable, for having these accounts collected by having them all assigned to the Finance Company as Trustee for whichever might be entitled to the net proceeds, for having the net proceeds deposited in such a way that the parties might reach a fair decision as to which was entitled to them, or, in case of failure to agree, of having the proceeds safely held until a Court had established the respective rights of the parties.

The Appellant contends that the Finance Company having agreed that a suit might be brought by the Appellant in the State Court ought not now to be allowed to violate its agreement by seeking a removal simply because, as is apparent, its attorneys have advised it that it stands a better chance to get the funds in the Federal Court than in the State Court.

II

WHICH ASSIGNEE HAS THE PRIOR CLAIM TO THE PROCEEDS OF THE ASSIGNED ACCOUNTS?

The Appellant lent its money and received its assignment on May 16, 1919. The Finance Company lent its money and received its assignments on July 15, 1919 and September 20, 1919, respectively. All parties involved in the first assignment, namely, the assignor, the assignee and the debtor, were citizens of Massachusetts. In the subsequent assignments the Finance Company alone was not a citizen of Massachusetts. In the case of each assignment the debt was payable in Massachusetts under a contract made in Massachusetts (Record, p. 16).

Neither the Appellant nor the Finance Company gave any notice to the debtor (the Murray & Tregurtha Corporation) until after the loans had been made and the assignments given, and neither party made any inquiry of the debtor prior to making its loan (Record, p. 16). It is not disputed that the Finance Company gave the first notice of an assignment to the debtor, but not until after it had made its loans and in the case of its principal loan, more than two months after (Record, p. 16).

(*a*) The first assignee should have priority unless for some reason it is estopped.

The assignment of a chose in action is valid and complete, and title to it passes, before any notice is given to the obligor.

Greey v. *Dockendorff*, 231 U. S. 513.
Putnam v. *Story*, 132 Mass. 205.

Thayer v. *Daniels*, 113 Mass. 129, at 131.
Fortunato v. *Patten*, 147 N. Y. 277.
In re Hawley Furnace Co. (C. C. A. 3d Circ.), 238 Fed. 122, at 125.
Petition of National Discount Company (C. C. A. 6th Circ.), 272 Fed. 570 (and cases cited).

Brown, J., in his dissenting opinion in this case (see Record, p. 29) points out that by a Statute in Massachusetts "the assignee of a legal chose in action assigned in writing has a legal right of action in his own name." This Statute at the time of the assignments in question was Revised Laws, C. 173, Sec. 4; now, since the recent codification of the Statutes in Massachusetts, General Laws, C. 231, Sec. 5. There has been no change in the wording of the section. In both Revised Laws and the General Laws it reads as follows:—

> "The assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defences and rights of counterclaim, recoupment or set-off, to which the defendant would have been entitled had the action been brought in the name of the assignor."

It seems to the Appellant unnecessary to discuss the question on which the authorities seem in some conflict,—whether in view of a Statute of this sort, a legal as distinguished from an equitable title, to a chose in action passes by an assignment in writing. Some title passes;—about that there is no question, and the title is complete so far as the assignor has power to give title. It is, however, unquestionably true, as will be seen by the authorities in all jurisdictions including those in Massachusetts, that the title which an assignee gets may be ousted by estoppel.

Brown, J., says (Record, p. 31), "It is a general principle in courts of equity that, where both parties claim by equi-

table titles, the one who is prior in point of time is deemed the better in right." The same principle must be applied in a case of legal titles.

The Appellant believes this principle cannot be controverted, and if this is true it must determine this case, whether the Court holds the assignment carried a legal or an equitable title, unless on some doctrine of equitable estoppel the rights of the first assignee must be subordinated to those of the second. Any such estoppel, however, to be equitable, must necessarily involve some negligence, laches or other action or inaction on the part of the first assignee which resulted in the second assignee's doing something which it would not otherwise have done.

In this case there is no such equitable estoppel. It is true the Appellant gave no notice to the debtor of its assignment, but this lack of notice in no way affected the conduct of the second assignee. Even if the first assignee *had* notified the debtor, the second assignee would not have discovered it because it made no inquiry of the debtor before taking *its* assignments. As Brown, J., points out (Record, p. 32), there is nothing to show "that the failure of the first assignee to give notice influenced its [the Finance Company's] conduct or that of the debtor."

Upon what, then, does the Finance Company base its claim to the fund in controversy? It is clear from the Record, including both majority and dissenting opinions, that its claim rests solely upon the fact that it first gave notice to the debtor. As stated by Brown, J. (see Record, p. 31), "We are asked to accept and apply the following rule: 'Between two successive bona fide assignees of the same chose in action, the second will prevail if he was the first to give notice to the debtor.' "

(*b*) The claim of the later assignee is based not on estoppel, but on mere priority of notice and should not prevail.

A study of the Record and particularly of the memorandum of decision of Anderson, J., in the District Court (Record, pp. 21 and 22) and of the majority opinion of the Circuit Court of Appeals (Record, pp. 26–28) and the Appellant predicts, of the Finance Company's brief, when presented, will disclose the fact that Brown, J., has accurately and comprehensively stated the entire contention of the Finance Company. In other words, the District Court and the Circuit Court of Appeals for the First Circuit have ruled as a matter of law that mere priority of notice, stripped of all equitable considerations, and standing stark naked, is sufficient to conclude the question. The Finance Company asks this Court to adopt the same rule.

It is necessary to review the authorities which have led the two Courts passing upon this case to such an astounding result.

It is evident from a perusal of the memorandum of decision of Anderson, J., and of the majority opinion of the Circuit Court of Appeals, that the result in each case was reached by a blind following of what the Court considered binding precedent. Anderson, J., is almost apologetic in his memorandum, and, while Bingham, J., in his opinion conceals his emotion, it is evident that he rests the decision solely on what he calls "the well-established rule in the Federal Courts."

Neither of these learned Judges gives any reason defending the rule or supposed rule of law which is followed, and it is submitted by the Appellant that in the few other cases where this rule of law, stripped, as stated above, of all equitable considerations, has been laid down, no defence of it as a matter of principle, will be found. This will be shown later in a detailed discussion of the authorities.

Anderson, J., and Brown, J., in his dissenting opinion,

both state that the rule on this question in the Commonwealth of Massachusetts is contrary to what the District and the majority of the Circuit Court of Appeals have held to be the Federal rule.

Anderson, J., states (Record, p. 21), "The Massachusetts rule is in favor of the prior assignee."

Brown, J., states (Record, p. 28), "It is conceded that under the law of Massachusetts the fund belongs to the Salem Trust Company, the first assignee."

Bingham, J. (Record, p. 28), makes the following admission: "The law of Massachusetts relating to the assignment of choses in action is the same as that of New York. . . ."

That the Massachusetts rule *is* in favor of the first assignee cannot be questioned. In that State it is clearly established that in the absence of estoppel the claim of the first assignee of a chose in action will prevail against that of a subsequent assignee regardless of notice to the obligor.

> *Thayer* v. *Daniels*, 113 Mass. 129, at 131.
> *Putnam* v. *Story*, 132 Mass. 205.
> *Herman* v. *Conn. Mut. Life Ins. Co.*, 218 Mass. 181, at 186.
> *Rabinowitz* v. *People's Nat'l Bank*, 235 Mass. 102, at 104.

At the outset, therefore, it is clear that in the mind of the Court there were two rules of law,—the so-called Federal rule and the so-called Massachusetts rule. A study of the case makes it appear obvious that the Finance Company thought that the law governing successive assignments of choses in action differed in the Federal and Massachusetts Courts, and that was the reason for its petition for removal of the case to the Federal Court.

An analysis of this idea existing in the minds of the Circuit Court of Appeals and of the Finance Company seems appropriate and involves three questions: First: What territory is the jurisdictional unit whose law applies?

Second: What Court is to be followed in the determination of that law? Third: What is the rule laid down by such Court?

Since the contracts of assignment were both made in Massachusetts, and to be performed there, and since all the parties involved, with the exception of the Finance Company, were Massachusetts corporations, and since the forum was a Massachusetts forum, it is evident that the territorial law of Massachusetts must govern all the questions involved, unless the fact that the Finance Company was a Delaware corporation gives it the right to demand the application of the law of some other geographical unit.

Brown, J., in his dissenting opinion (Record, p. 30) shows clearly that a foreign corporation admitted by a State to do business therein, is not, on account of the fact that it is a citizen of another State, entitled to preferential treatment over citizens of the State in which it is doing business, but, on the contrary, is held to accept the laws of that State, and cites *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, at 315; *Shaffer* v. *Carter*, 252 U. S. 37, at 53.

But, though the territorial law of Massachusetts applies, there still remain the questions as to what is the territorial law of Massachusetts, and what ought properly to influence the Federal Courts in their declaration of such law. This is well stated by Professor Beale of the Harvard Law School, in the Summary to the 1902 Edition of Beale's Cases on Conflicts of Laws, as follows:—

> SEC. 13. "When two courts of equal authority, and without a common superior, have the duty of declaring the same law, there is no possibility of compelling them to adopt the same view of the law. If they differ, this cannot mean that there are two laws, but merely that one court or both, is mistaken in its statement of the law.
>
> "An example of such co-ordinate courts, without a common superior is the State and Federal Courts, in

> all cases where Federal jurisdiction depends upon diverse citizenship. In such cases the Federal Court is declaring the law of the State, but declines to accept as binding, a prior declaration of the law by the State Court."

The majority opinion in the Circuit Court of Appeals held that the relative merits of the equities of successive assignees of the same chose in action was a question of general jurisprudence, and that, consequently, the Federal Courts were not bound by decisions of the State Court in determining the territorial law of Massachusetts.

Much space could be occupied in reviewing the authorities and discussing the point raised by the statement in the majority opinion of the Circuit Court of Appeals that the question "is one of general jurisprudence as to which the decisions of the highest courts of a State are not controlling. . . ." But after all, whether or not the phrase "general jurisprudence" is rightly used, the idea in the mind of the Court really amounts to nothing more than that the question is one which the Federal Courts have a right to decide as they think best, without more regard than mere respect to the decisions of the highest Court of the State in which the question arises. If this is true, it goes without saying that the question should be decided rightly and not wrongly, unless an incorrect rule has been established by precedents of such a character that it would upset the business of the community to have a change made. In this case, as will be shown later, there were no precedents laid down by the Supreme Court of the United States, establishing or approving the naked rule of law contended for by the Finance Company, nor were there any such precedents binding upon the Circuit Court of Appeals for the First Circuit, as that Court was not bound by the decisions of the Circuit Court of Appeals for the Second Circuit, unless those had been approved by the Supreme Court of the United States.

Unquestionably the following may be stated as a general rule:—

> "Rules of property established by the judicial decisions of the highest court of a state, and also general rules and principles of jurisprudence locally developed and peculiar to the given state, whether statutory or growing out of common law, when similarly established, will be accepted and followed by the United States courts without inquiry into their legal correctness, no federal question being involved."
>
> Black's Law of Judicial Precedents, Sec. 149.

There are, however, certain exceptions which the Supreme Court of the United States has itself recognized, such as questions arising out of the law merchant or general commercial law and questions described, whether rightly or wrongly, as of general jurisprudence.

On the other hand, the Supreme Court of the United States has stated in a number of cases that on many questions the local law of a State should be followed by the Federal Court, particularly in cases where no Federal question is involved and the jurisdiction of the Federal Court depends solely on diversity of citizenship. These cases will be dealt with later.

As the Appellant has intimated, it may be unnecessary for this Court to enter into a detailed consideration of the principles suggested by the preceding paragraphs, because it is clear that whether or not the Federal Court is bound, on this particular question, to follow the decisions of the State Court, it certainly is true that the decision of the Federal Court ought to be right and not wrong, and the rule contended for by the Finance Company appears to the Appellant so clearly wrong that it does not believe this Court will uphold it.

At any rate, the law involved is the body of law governing the physical territory of the Commonwealth of Massachusetts. There can be only one true body of law govern-

ing any geographical unit. The Massachusetts Courts have an established rule on the precise question here involved. If the rule thus established is not the law of Massachusetts, it must be because of the existence of another rule of law applicable to Massachusetts, which the Federal Courts sitting in Massachusetts are bound by precedent or are at liberty to follow. If the Federal Courts declare a rule of law without the restrictions of a binding precedent, then such rule must be in accordance with reason and the true principles of law and equity pertaining to the question involved. If they are bound by precedent, it must be precedent applicable within the territorial limits of their jurisdiction, as established either by the State Courts, by the District or Circuit Court for Massachusetts, or by the Supreme Court of the United States, either for Massachusetts, or for the United States as a whole. The decisions of the Circuit Court of Appeals for the other Circuits are not binding upon the Circuit Court of Appeals for the First Circuit; although conflicting decisions in different Circuits where not justified by a similar conflict between the rules of the State Courts in their respective territories, may indicate that one or the other is in error, and thus justify the granting of a writ of certiorari.

The Appellant contends that the true rule applicable to this case is the rule that notice to the debtor is not necessary to protect a prior assignee of a chose in action against a subsequent assignee who, having made no inquiry of the debtor, was not deceived by want of such notice, and who has not acquired a legal title.

If this rule is established, a person contemplating lending money on an assignment of a chose in action, will know that to surely protect himself he ought first to inquire of the debtor whether he knows of any prior assignment, and after taking the assignment he should promptly notify the debtor, so that on a subsequent inquiry the debtor may disclose the fact of the assignment. The inquiry of the debtor, however,

by one contemplating taking an assignment is an essential element. Mere notice to the debtor accomplishes nothing and both inquiry and notice on the part of a subsequent assignee should be held by the courts necessary to oust a prior assignment.

(c) The Federal decisions relied on by the majority of the Circuit Court of Appeals for the First Circuit and by the Finance Company do not justify this Court in approving the rule laid down and contended for.

An excellent, thorough and logical discussion of the authorities and law on this point will be found in the dissenting opinion of Brown, J. (Record, pp. 31-38).

It would seem unnecessary to add to what the learned Judge has said in this part of his opinion. The question, however, is one of importance, and to the Appellant of particular importance, and in order that nothing may be left unsaid which has occurred to its counsel, the Appellant feels obliged to ask the Court to indulgently consider the matter further.

To start with the cases which to date have been relied upon either by the majority of the Circuit Court of Appeals or by the Finance Company, there are only two (aside from State Court cases, where the rule varies so widely in different States that the Appellant hesitates to burden the Court with a discussion of the variations) which support the naked rule laid down by the majority of the Circuit Court of Appeals and asked for by the Finance Company. Those two were both decided by the Circuit Court of Appeals for the Second Circuit, namely, *Methven* v. *Staten Island Light, Heat & Power Co.* and *In re Leterman Becher & Co. Inc., supra.* The latter is based squarely on the former, and the former is based on the Court's understanding of two cases decided by the Supreme Court of

the United States, namely, *Judson* v. *Corcoran*, 17 How. 612, and *Spain* v. *Hamilton's Administrator*, 1 Wall. 604.

The Circuit Court of Appeals for the Second Circuit, therefore, thought it was applying a rule which had been laid down by the Supreme Court of the United States, and, therefore, it becomes necessary to study *Judson* v. *Corcoran* and *Spain* v. *Hamilton's Administrator*.

In the former, a part owner of a suspended claim against Mexico for unlawful seizure of a cargo assigned to Judson an interest therein, subsequently assigning the entire claim to others. To the latter assignments Corcoran eventually succeeded, and prosecuted the claim to a final award by the Board of Commissioners. Judson gave no notice of his claim until the final award. It was held (p. 614):—

> "Here Corcoran has drawn to his equity a legal title to the fund [the award of the Commissioners], which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect."
>
> "Now nothing is better settled than that this cannot be done. The equities being equal, the law must prevail."

The dictum relied upon to establish the so-called "Federal Rule" is as follows:—

> "There may be cases in which the purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought, as, for instance, where the purchaser who alone has made inquiry and given notice to the debtor . . . would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy."

Neither the decision nor the dictum establishes the naked rule that mere priority of notice is sufficient to entitle a subsequent assignee to the fund. On the contrary, the dictum, instead of being an authority in support of this

rule, seems to support the rule contended for by the Appellant, namely, that *both* inquiry and notice are necessary.

In *Spain* v. *Hamilton's Administrator*, Hamilton assigned to Spain generally all claims which he had or might later have against any person or body corporate for commissions for personal services. Later, Hamilton assigned a specific claim for commission to other assignees for value. The person from whom the commission was payable "accepted" the later assignments upon notice thereof. Spain gave no notice until after such "acceptance," six years after the assignment to him. Your Honorable Court found for the later assignees. That they had made inquiry and that your Honorable Court considered this important, is seen on page 623, where it is said:—

> "On the contrary Wetmore and Corcoran and Riggs used every precaution to protect themselves before the latter lent to Hamilton $25,000."

Another case decided by the Supreme Court of the United States, namely, *Laclede Bank* v. *Schuler*, 120 U. S. 511, was relied upon by the Finance Company before the Circuit Court of Appeals. That case was not one of successive assignments, but one where a debtor gave a check on his bank account and later, before the check had been presented to the bank, made an assignment for the benefit of creditors. This Court said the check was only an acknowledgment of debt and did not become effective until presented for payment, and meantime, the assignment for creditors had been made, and the bank notified of it before presentation of the check. It is obvious there is a clear distinction between that case and one of successive assignments. If, as seems clear, the two cases decided by the Circuit Court of Appeals for the Second Circuit are based on a misapprehension of what the Supreme Court of the United States *has* decided, it follows that they are not entitled to consideration, because they do

not purport to establish any rule of their own or to defend the rule they declare, but simply rest on what they believe to have been the decisions of this Court.

Again ignoring, for the sake of brevity, the various decisions in various States, so far as the *Federal* cases go, they all relate back to the English case of *Dearle* v. *Hall*, 3 Russ. 1. That case is exhaustively considered by Brown, J., in his dissenting opinion. It is only necessary to again suggest that that case, supposed by such of our Federal Courts as have adopted the naked rule of mere priority of notice to be the parent of that rule, does not lay down that rule. There the subsequent assignee which was given preference not only had given the first notice, but had made *inquiry*.

See *Dearle* v. *Hall*, 3 Russ. 1, at page 18:—

> "It was said that Hall [the successful assignee] had not exercised due diligence; for that the question, whether there was any prior encumbrance on the fund was not put directly either to Brown [the assignor] or to the executor, and it is true that the question was not put in expressed words; but was it not put in substance? The inquiries were such as drew from Unthank [the trustee] what is tantamount to an assurance that there was an absolute title in Brown."

This was a material circumstance, the Court treated it as such, and, in the opinion of the Appellant, it was the basis of the Court's opinion.

As Brown, J., points out, some of the later English cases have criticised most emphatically *Dearle* v. *Hall*, and its companion case, *Foster* v. *Cockerell*, 3 Cl. & F. 456.

There are several other Federal cases which the Finance Company relied on before the Circuit Court of Appeals, namely:—

Farmers and Merchants Bank v. *Farwell*, 58 Fed. 633 (C. C. A. 8th Circ.).

The Elmbank, 72 Fed. 610 (D. C. Cal.).

Third National Bank v. *Atlantic City*, 126 Fed. 413 (C. C. N. J.).
In re Hawley Down-Draft Furnace Co., 233 Fed. 451 (D. C. Penn.).

In the first of these, it is a dictum only that is relied on by the Finance Company, but the part of the opinion in which this dictum is contained clearly shows it is no authority for the naked rule of priority of notice (see pp. 637–638):—

> "If, while he held possession of the policies and was prosecuting the actions upon them in his own name Frishman had assigned his claim against the companies to the bank or to a third person for value, and without notice of the prior assignment, and the subsequent assignee had first given notice to the Insurance Companies of his assignment, Farwell & Co. would have been estopped to claim the proceeds of the policies as against such an assignee. To this effect are *Dearle* v. *Hall*, *Spain* v. *Hamilton's Administrator* and *Judson* v. *Corcoran*. And they rest upon the rule that where one of two innocent parties, holding title of equal apparent validity must suffer through the fault of a third that one must bear the loss who has put it in the power of the third to commit the fraud."

This is far from saying that a first assignee will lose, even though a second assignee having made no inquiry, and not being deceived by any want of notice, himself gave notice long after giving value for his assignment.

No great reliance can be placed on the dictum in *The Elmbank*, *supra*.

The case of the *Third National Bank* v. *Atlantic City*, *supra*, taken in connection with the opinion of the Circuit Court of Appeals in that case reversing the lower Court (130 Fed. 751), is fully as much an authority for the Appellant as it is for the Finance Company.

In that case a man having a contract with a City pre-

sented an order to the City requesting the issue of a warrant to a bank (with which the contractor was doing business), for some of the money due. The City accepted the order, which the contractor then delivered to the bank, which gave no further notice to the City until after the contractor had made assignments to other persons of the same sums, some of which persons gave notice to the City prior to that given by the bank.

The Circuit Court of Appeals stated in substance (p. 753) that the Circuit Court had ruled that where there were two assignments of the same chose in action, the assignee first giving notice to the debtor had the prior right. It proceeds "But even upon that principle, the conclusion of the court we think was wrong"; and then decides the case for the bank on the ground that the acceptance by the City of the order requesting the issue of a warrant to the bank completed a title in the bank.

The case of *In re Hawley Down-Draft Furnace Co., supra*, relied on by the Finance Company, was reversed by the Circuit Court of Appeals for the Third Circuit (see 238 Fed. 122).

At any rate it should be observed that the District Court of Pennsylvania in *In re Hawley Down-Draft Furnace Co.* applied the local law of Pennsylvania, which is to the effect that the assignee who first gives notice to the debtor obtains the priority.

The Federal cases which have adopted or followed the naked rule of priority of notice all seem to relate back to the English case of *Dearle* v. *Hall, ubi supra*. In that case, as has been shown, there was another element—namely, inquiry—in addition to priority of notice. In the case of *Loveridge* v. *Cooper*, 3 Russ. 30, decided by the same Court and at the same time as *Dearle* v. *Hall*, there was also the element of inquiry. Certain of the later English cases, of which perhaps the most notable example is *Foster* v. *Cockerell*, 3 Cl. & F. 456, which purports to rest on *Dearle* v. *Hall*

and *Loveridge* v. *Cooper*, seem, however, to have adopted the naked rule of mere priority of notice.

As Brown, J., points out in his dissenting opinion (Record, p. 31), *Dearle* v. *Hall* and *Foster* v. *Cockerell* were roughly handled by Lord Macnaghten in *Ward* v. *Duncombe*, 1893 A. C. 369, 390, who stated that the rule adopted "gives the go-by to all considerations founded upon the conduct of the parties" and "has gone perilously near legislating."

If *Dearle* v. *Hall* is to be stripped of the element of inquiry and taken as authority for the naked rule of mere priority of notice, then the Appellant is ready to go even further than Lord Macnaghten and to say that the Courts in *Dearle* v. *Hall* and *Foster* v. *Cockerell* actually did usurp the functions of legislative bodies.

In cases of successive assignments of choses in action it is fair for one and fair for all to have well-established rules of equitable estoppel applied, which rules must depend, in large measure, on the conduct of the parties. To arbitrarily establish, however, as the *sole* element a mere giving of notice to the debtor, often long after the subsequent assignee has taken his risk and lent his money without preliminary precautions, and where the lack of notice by a prior assignee has in no way deceived him, is nothing short of legislation, and should depend on statute and not on judicial determination.

If it has not become sufficiently clear that the naked rule of priority of notice is not based on any sound or sensible principle of equity and is not a practical means of accomplishing the result which all Courts desire, the Appellant believes a perusal of the case of *Foster* v. *Cockerell*, *ubi supra*, including the arguments of counsel for the prior assignee, will carry conviction. Not a single argument defending the rule is made by the Court, while many arguments are given against it by counsel for the prior assignee.

So much for the authorities relied upon as upholding the naked rule of mere priority of notice.

The Appellant respectfully submits that not only the weight of authority of the decisions in the various State Courts, but also the weight of Federal decisions are against this rule and in favor of a rule based on equitable estoppel.

For the convenience of the Court, the Appellant, further on, will give a reference to some of the cases establishing one rule or another in some of the States. For the moment, however, it seems more important to speak of Federal decisions.

In the case of *Grecy* v. *Dockendorff*, 231 U. S. 513, no question was raised between successive assignees, and therefore it was not necessary for the Court to deal with that question. The Court did, however, make some important rulings, and the trend of the reasoning is such as would seem to justify the Appellant in believing this Court will not approve the naked rule of mere priority of notice.

One Dockendorff lent money to a company (later adjudicated bankrupt) under an agreement whereby the company was to assign to Dockendorff accounts receivable within seven days of shipment of goods. Were such assignments good as against general creditors of the bankrupt? The Court held that they were, and said at page 516 (Mr. Justice Holmes):—

> "The advances were the liens by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *New York*, 6 N. Y. 179. . . . It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors. *Williams* v. *Ingersoll*, 89 N. Y. 508, 522, and merely keeping silence to the latter whether known or unknown created no estoppel.
>
> *Wiser* v. *Lawler*, 189 U. S. 260, at 270.
> *Ackerman* v. *True*, 175 N. Y. 353, 363.

There was no active concealment and no attempt to mislead any one interested to know the truth."

Incidentally it would seem as if this Court, in considering the question of the validity of an assignment, had applied the local law as laid down by the Courts of New York State.

The case of Petition of the National Discount Company, 272 Fed. 570 (C. C. A. 6th Circ.), is helpful as showing not only that "the Tennessee rule of necessity of notice to the debtor is opposed to the great weight of authority" (see p. 576), but also that the Court thought this question of notice as affecting the validity of an assignment involved "a rule of property having a situs within the state" and because the Court considered that the situs of the property was Ohio and not Tennessee, it followed Ohio and not Tennessee state law (see pp. 575–576).

On page 574 the Court says:—

> "Under the generally accepted rule of law, and where, as here, the rights of the debtors owing the accounts are not involved, the assignments in question, made, as they were, in good faith, were valid as against both the bankrupt and its creditors, notwithstanding no notice was given the latter, and in spite of the fact that the assigned claims remained in the bankrupt's possession, and that those liable to pay the claims were not notified of the assignment.
>
> "*Greey* v. *Dockendorff*, 231 U. S. 513–516; *In re Cincinnati Iron Store* (C. C. A. 6, 167 Fed. 486–490); *Union Trust Co.* v. *Bulkley* (C. C. A. 6, 150 Fed. 510–516–517); *In re Hawley Furnace Co.* (C. C. A. 3, 238 Fed. 122–125); *Williams* v. *Ingersoll*, 89 New York 508, 522; *Thayer* v. *Daniels*, 113 Mass. 129; *Copeland* v. *Manton*, 22 Ohio State 44; *Preston National Bank* v. *Purifier Co.*, 84 Michigan 364–387."

As a summary of what has been said under this subdivision (*c*) of II, the Appellant quotes the following from the dissenting opinion of Brown, J. (Record, pp. 37–38):—

"Taking the decision in *Dearle* v. *Hall* as a whole, coupling together inquiry, reliance and notice, we have the rule as stated in *Somerset* v. *Cox*, 33 Beav. 634, 639: 'By means of it money may safely be lent on security of trust funds on ascertaining that the trustee has no notice of any prior incumbrance.'

"As an exception to the general rule that he who is prior in time is prior in right this seems to be a reasonable rule that can be administered without contradiction of the established principles of estoppel and laches. We are not required by the decisions of the Supreme Court to go further.

"The further exception from that general rule of cases where the second assignee is prior merely in giving notice *ex post facto* is not supported by substantial reasons."

The Appellant will not quote, but will respectfully refer the Court to the rest of what is said by the learned Judge on page 38.

So far as a definite position has been taken on the question here involved, by the courts of the several States, the following will show what the rule is in the States named. In the other twenty-one States apparently no definite rule has yet been established.

In the following States the rule of equitable estoppel applies between successive assignees: Alabama, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Oregon, South Carolina, Texas, Washington, West Virginia.

In the following States the naked rule of mere priority of notice seems to have been applied: California, Connecticut, Iowa, Maryland, Mississippi, Missouri, New Jersey, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia. Also District of Columbia.

(*d*) In this case, where no Federal question is involved and where the jurisdiction of the Federal Court depends solely on diversity of citizenship, the local law of Massachusetts *should* be followed.

The Appellant recognizes, as stated above, that this Court has established certain exceptions to the general rule of law that the United States Courts will follow rules of property and general rules and principles of jurisprudence established by State Courts. In each case it must be determined whether the particular rule in question falls within one of these exceptions.

The Appellant respectfully believes that, whether or not this Court decides the local law of Massachusetts *must* be followed in this case, the case will be decided in favor of the rule which the Appellant contends for, not because it is the Massachusetts rule, but because this Court is bound by no adverse precedent and will conclude that the rule is right in principle and affords sufficient protection to a subsequent assignee.

As, however, the majority of the Circuit Court of Appeals for the First Circuit, and the Circuit Court of Appeals for the Second Circuit in the cases of *Methven* v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113, and *In re Leterman, Becher & Co. Inc.*, 260 Fed. 543, have stressed the point that the question was one "of general jurisprudence" and therefore could be decided without reference to local law, the Appellant sets forth a number of cases which seem to it so analogous as to admit of no distinction, where this Court or some other Federal Court has held that local law should be applied.

1. State Court decisions control Federal Courts as to assignments and pledges of choses in action and as to chattel mortgages, conditional sales and liens:—

Bailey v. *Baker Ice Machine Co.*, 239 U. S. 268.
Dale v. *Pattison*, 234 U. S. 399.
Taney v. *Penn Bank*, 232 U. S. 174.
Barnes v. *Alexander*, 232 U. S. 117.
Sexton v. *Kessler*, 225 U. S. 90.
Brant v. *Swofford Bros.*, 214 U. S. 279.
Hiscock v. *Varick Bank of New York*, 206 U. S. 28.
Humphrey v. *Tatman*, 198 U. S. 91.
Thompson v. *Fairbanks*, 196 U. S. 516.
Dooley v. *Pease*, 180 U. S. 126.
Knapp, Stout & Co. v. *McCaffrey*, 177 U. S. 638.
Etheridge v. *Sperry*, 139 U. S. 266.
Randolph v. *Quidnick Co.*, 135 U. S. 457.
Berlet v. *Lehigh Valley Silk Mills*, 287 Fed. 769 (C. C. A. 3d Circ.).
In re Hub Carpet Co., 282 Fed. 12 (C. C. A. 2d Circ.).
Atherton v. *Beaman*, 264 Fed. 878 (C. C. A. 1st Circ.).
First National Bank of Evanston v. *Bank of Waynesboro*, 262 Fed. 754 (C. C. A. 8th Circ.).
In re Hawley Down-Draft Furnace Co., 238 Fed. 122 (C. C. A. 3d Circ.).
Klinger v. *Hyman*, 223 Fed. 257 (C. C. A. 2d Circ.).
Triumph Electric Co. v. *Patterson*, 211 Fed. 244 (C. C. A. 8th Circ.).
Joseph Dixon Crucible Co. v. *Paul*, 167 Fed. 784 (C. C. A. 6th Circ.).
Union Trust Co. v. *Bulkley*, 150 Fed. 510 (C. C. A. 6th Circ.).
Brown v. *Grand Rapids Parlor Furniture Co.*, 58 Fed. 286 (C. C. A. 6th Circ.).
In re Ames, 283 Fed. 465.

In re Ballard, 279 Fed. 574.
In re Nader, 276 Fed. 123.
In re American Steel Supply Syndicate, 256 Fed. 876.
Commonwealth S.S. Co. v. *American Shipbuilding Co.*, 197 Fed. 780.
Hamilton v. *David C. Beggs Co.*, 179 Fed. 949.
Davis v. *Mills*, 99 Fed. 39.
J. M. Atherton Co. v. *Ives*, 20 Fed. 894.

2. As to real estate, wills, descent and distribution:—

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349.
East Central Eureka Mining Co. v. *Central Eureka*, 204 U. S. 266.
Whitaker v. *McBride*, 197 U. S. 510.
Clarke v. *Clarke*, 178 U. S. 186.
DeVaughn v. *Hutchinson*, 165 U. S. 566.
Schreyer v. *Scott*, 134 U. S. 405.
Lloyd v. *Fulton*, 91 U. S. 479.
Anderson v. *Gray*, 284 Fed. 770 (C. C. A. 5th Circ.).
Pickens v. *Merriam*, 274 Fed. 1 (C. C. A. 9th Circ.).
Midway Irrigation Co. v. *Snake Creek*, 271 Fed. 157 (C. C. A. 8th Circ.).
Wells v. *Brown*, 255 Fed. 852 (C. C. A. 8th Circ.).
Highland Park Mfg. Co. v. *Steele*, 232 Fed. 10 (C. C. A. 4th Circ.).
Percy Summer Club v. *Astle*, 163 Fed. 1 (C. C. A. 1st Circ.).
Mutual Development Co. v. *Kentucky Coal Lands Co.*, 285 Fed. 761.
McMullen v. *Zabawski*, 283 Fed. 552.
American Brake Shoe & Foundry Co. v. *New York Railways Co.*, 278 Fed. 842.

3. As to construction of state constitutions and statutes:—

Lewis v. *Herrera*, 208 U. S. 309.
York Mfg. Co. v. *Cassell*, 201 U. S. 344.
Theological Seminary v. *Illinois*, 188 U. S. 662.
Warburton v. *White*, 176 U. S. 484.
Missouri, Kansas, etc., Trust Co. v. *Krumseig*, 172 U. S. 351.
Forsyth v. *Hammond*, 166 U. S. 506.
Balkam v. *Woodstock Iron Co.*, 154 U. S. 177.
Miller v. *Ammon*, 145 U. S. 421.
Bacon v. *Northwestern Life Insurance Co.*, 131 U. S. 258.
Railroad Co. v. *Georgia*, 98 U. S. 359.
Townsend v. *Todd*, 91 U. S. 452.
J. T. Fargason v. *Furst*, 287 Fed. 306 (C. C. A. 8th Circ.).
Irwin v. *Maple*, 252 Fed. 10 (C. C. A. 6th Circ.).
In re Jarnol, 283 Fed. 547.
Sanduski Cement Co. v. *A. R. Hamilton & Co.*, 273 Fed. 596.

4. As to liability for personal injury:—

Hartford Fire Insurance Co. v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91.
Bucher v. *Cheshire R.R. Co.*, 125 U. S. 555.
Detroit v. *Osborne*, 135 U. S. 492.
Dennick v. *Railroad Co.*, 103 U. S. 11.
Nichols v. *Atchison, Topeka & Sante Fe Ry.*, 286 Fed. 1 (C. C. A. 9th Circ.).
Snare & Triest Co. v. *Friedman*, 169 Fed. 1 (C. C. A. 3d Circ.).
Easton v. *Houston & T. C. Ry. Co.*, 32 Fed. 893.

5. As to miscellaneous contracts:—

Lubriko Co. v. *Wyman*, 290 Fed. 12 (C. C. A. 3d Circ.), personal service contract.

B. F. Sturtevant Co. v. *Fidelity & Deposit Co., of Maryland*, 285 Fed. 367 (C. C. A. 2d Circ.), personal service contract.

American Trading Co. v. *Steele*, 274 Fed. 774 (C. C. A. 9th Circ.), personal service contract.

In re Codman, 284 Fed. 273, relations between broker and customer.

Crampton v. *Lautz Bros. & Co. Inc.*, 274 Fed. 743, priority of claim for wages.

Brown, J., in his dissenting opinion, gives some reasons other than those usually mentioned in such cases as are hereinbefore cited, why Massachusetts law should be followed (Record, pp. 28–30).

He points out first that the contract which created the debt assigned was a Massachusetts contract between two Massachusetts corporations; that the first assignment was made in Massachusetts, to a Massachusetts corporation. He says, "As these transactions were all between citizens of Massachusetts, the state law of that state determined as between them, the obligations and rights of the three parties —the debtor, the assignor and the assignee."

He proceeds, "After the rights of these citizens of Massachusetts had become fixed under the law of that state. . ." the second assignment was made to a Delaware corporation, but one having a usual place of business in Massachusetts. "The different citizenship of the second assignee is not enough to avoid the conclusion that the second assignment, like the first, was a contract made and to be enforced in Massachusetts, and subject to the laws of that state."

Again he says, "The rule that authoritative state decisions rendered by a state court before the rights of the parties accrued and became fixed are presumed to be known to the parties, and form part of the contract, seems as applicable to written assignments of book accounts, or accounts receivable, as to conveyances or written instruments between private parties evidencing a transfer of real property or tangible personal property. . . ."

Again: "It would seem sufficient for the purposes of this case to hold that the state law of Massachusetts forms part of and controls these contracts of assignment. A foreign corporation which is permitted to maintain a usual place of business in the state of Massachusetts for the transaction of local business, certainly has no right to preferential treatment as compared with resident citizens of Massachusetts, or to complain that it is subject to the same law. . . . The different citizenship of the parties does not give to the contract an interstate character or create a right to question the local policy of a state in respect to the transfer of property, tangible or intangible."

(e) The denial of certiorari in *In re Leterman, Becher & Co.*, 260 Fed. 543—see *Coleman & Co.* v. *Tawas & Co.*, 250 U. S. 668—adds nothing to the authority of that case.

The above proposition is laid down by Brown, J., in his dissenting opinion (Record, p. 38), and he cites the case of *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, at 257 and 258.

This proposition seems reasonably clear, but Bingham, J., in the majority opinion in the Circuit Court of Appeals (Record, p. 28), lays great stress on this denial of certiorari.

Regardless of how the question may have been presented to this Court in the petition for certiorari in the case of *Coleman & Co.* v. *Tawas & Co.*, there is a clear distinction

between that case and the present case, for the contracts in *In re Leterman, Becher & Co., supra*, were made after the decision in the Second Circuit of *Methven* v. *Staten Island Light, Heat and Power Co., supra;* whereas in this case, when the assignments were made, the established decisional rule of the Massachusetts State Courts was as yet unassailed by any contrary decision of its Federal Courts, and the petition for certiorari in the Leterman case had not been denied.

There is another case in which the Supreme Court of the United States has granted certiorari: see *Wallace Benedict as Receiver, etc.* v. *Aaron Ratner*, 259 U. S. 579.

In that case, a writ of certiorari was granted from the decision of the Circuit Court of Appeals for the Second Circuit in *In re Hub Carpet Company*, 282 Fed. 12.

As nearly as can be ascertained from the briefs, the sole contention of the Appellant in that case is that an assignment of accounts receivable, in case the accounts are left in the possession of the assignor, should be treated under the so-called New York Personal Property Law on the same basis as mortgaged chattels. There is no question in that case between successive assignees of the same accounts, while there is no question in the case at bar between creditors of the assignor and either of the assignees. Therefore, even if this Court should uphold the contention of the Appellant in *Benedict* v. *Ratner*, it cannot be taken as an authority against the Appellant in this case. If an authority at all, it would preclude the Finance Company as effectually as the Appellant.

As, however, it is a logical although minor part of the Appellant's case, to have the rule settled that an assignment of an account receivable carries title as between assignor and assignee without notice to the debtor, and is good also against creditors of the assignor, the Appellant will refer the

Court again to the Case of *Greey* v. *Dockendorff*, 231 U. S. 513, which would seem to be directly contrary to the contention of the Appellant in the *Benedict* v. *Ratner* case.

It is submitted that by the great weight of authority an assignee of a chose in action has priority without notice over attaching or other creditors of the assignor. 5 Corpus Juris, 971–973.

CONCLUSION

If the Court feels the case was erroneously removed from the State Court, there is no need to consider the other branch of the case.

If, on the other hand, the Court feels that this cannot be decided as a matter of law, the question as to the priority of rights of successive assignees is fairly presented, and in that event the Appellant contends:—

1. That the Court should apply the local law of Massachusetts which is in favor of the first assignee.
2. That even if the Court decides it is not obligated to follow the local law, there are no precedents which make it necessary to approve the naked rule of mere priority of notice.
3. That the rule to be applied is that the earlier assignee is the prior in right, unless his claim should be subordinated on account of circumstances which create an equitable estoppel.
4. That mere priority of notice to the debtor by a later assignee who made no inquiry of the debtor before lending his money and taking his assignment, and who was in no way deceived by lack of notice to the debtor on the part of an earlier assignee, is not sufficient to create an equitable estoppel.
5. That the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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SALEM TRUST COMPANY *v.* MANUFACTURERS' FINANCE COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 74. Argued October 15, 1923.—Decided February 18, 1924.

1. In a suit between citizens of different States to determine which of them is entitled to a fund which by their agreement has been collected by one and deposited to his special account, as trustee, to be paid to himself or the other as the issue between them shall be determined, the depositary is not a necessary party, and its joinder as defendant in the state court will not prevent removal to the federal court. P. 189.
2. In the absence of any local statute or usage, the question whether prior notice to the debtor of the later of two assignments of an account receivable subordinates the rights of the earlier to those of the later assignee, is a question of general law in deciding which the federal court is not bound by the decisions of the highest court of the State. P. 191.
3. While there are contingencies which entitle the second of two successive assignees of the same chose in action to prevail over the first, mere priority of notice to the debtor by a second assignee who lent money to the assignor in consideration of his assignment, without making any inquiry of the debtor, is not sufficient to subordinate the first assignment to the second. Pp. 194, 197.

280 Fed. 803, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a suit brought by the above named petitioner against the above named respondent, and its corespondent, International Trust Company, to determine the rights of the first two, as assignees, to a fund deposited with the third.

Mr. Alexander Whiteside, with whom *Mr. Arthur Drinkwater* and *Mr. Raymond P. Baldwin* were on the brief, for petitioner.

The proceeding was erroneously removed.

The trust *res* is the debt the Trust Company owes the Finance Company as trustee under the agreement between petitioner and respondent. This suit was brought by petitioner not only to determine its rights, but to collect the debt. The Trust Company was made a party for the purpose of collection, and for that purpose must be an indispensable party.

The agreement also provided that the question of the ownership of the proceeds of the assigned accounts, if the two parties should be unable to agree on the same, should be determined by a proper proceeding, brought by either party, in a court of competent jurisdiction. This amounts to an agreement on the part of the Finance Company that petitioner might bring a proceeding in *any* court of competent jurisdiction. While an agreement not to remove a case to a federal court is void, it does not follow that an agreement that a party may prosecute an action in a state court is not valid and enforceable where based on adequate consideration.

By the great weight of authority an assignee of a chose in action has priority without notice over attaching or other creditors of the assignor. 5 Corpus Juris, 971–973.

The first assignee should have priority unless for some reason it is estopped. The assignment of a chose in action is valid and complete, and title to it passes, before any notice is given to the obligor. *Greey* v. *Dockendorff*, 231 U. S. 513; *Putnam* v. *Story*, 132 Mass. 205; *Thayer* v. *Daniels*, 113 Mass. 129; *Fortunato* v. *Patten*, 147 N. Y. 277; *In re Hawley Furnace Co.*, 238 Fed. 122; *Petition of National Discount Co.*, 272 Fed. 570. Whether legal or equitable, some title passes,—all that the assignor has power to give.

In Massachusetts, in the absence of estoppel, the claim of the first assignee will prevail against that of a subsequent assignee regardless of notice to the obligor. *Thayer* v. *Daniels*, 113 Mass. 129; *Putnam* v. *Story*, 132 Mass.

205; *Herman* v. *Mutual Life Ins. Co.*, 218 Mass. 181; *Rabinowitz* v. *People's Natl. Bank*, 235 Mass. 102.

Since the contracts of assignment were made and to be performed in Massachusetts, and since all parties, except the Finance Company, were Massachusetts corporations, and since the forum was a Massachusetts forum, the law of Massachusetts must govern all the questions involved. The fact that the Finance Company was a Delaware corporation does not give it the right to demand the application of the law of some other geographical unit. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Shaffer* v. *Carter*, 252 U. S. 37.

The court below erroneously held that the relative merits of the equities of successive assignees of the same chose in action was a question of general jurisprudence and that, consequently, the federal courts were not bound by decisions of the state court in determining the territorial law of Massachusetts.

The federal decisions relied on by the majority of the court below and by the Finance Company do not justify this Court in approving the naked rule of mere priority of notice. *Methven* v. *Staten Island Light Co.*, 66 Fed. 113; *In re Leterman, Becher & Co.*, 260 Fed. 543; *Judson* v. *Corcoran*, 17 How. 612; *Spain* v. *Hamilton's Admr.*, 1 Wall. 604; *Laclede Bank* v. *Schuler*, 120 U. S. 511; *Dearle* v. *Hall*, 3 Russ. 1; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633; *The Elmbank*, 72 Fed. 610; *Third National Bank* v. *Atlantic City*, 126 Fed. 413; and *In re Hawley Furnace Co.*, 233 Fed. 451, distinguished. See *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Ward* v. *Duncombe*, [1893] A. C. 369. The weight of authority in the various state courts, and also the weight of federal decisions, are against this rule. *Greey* v. *Dockendorff*, 231 U. S. 513; *Petition of National Discount Co.*, 272 Fed. 570.

State court decisions control federal courts as to assignments and pledges or choses in action and as to chattel

mortgages, conditional sales and liens; as to real estate, wills, descent and distribution; as to construction of state constitutions and statutes; as to liability for personal injury; and as to miscellaneous contracts. [Citing many decisions of this and of lower federal courts.]

The denial of certiorari in *In re Leterman, Becher & Co.*, 260 Fed. 543, adds nothing to the authority of that case. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251. See *Coleman & Co.* v. *Tawas Co.*, 250 U. S. 668; and *Benedict* v. *Ratner*, 259 U. S. 579.

Mr. Robert G. Dodge, with whom *Mr. Laurence Curtis 2d* was on the brief, for respondents.

The fact that the International Trust Company, which, like the plaintiff, is a Massachusetts corporation, was made a party defendant, did not prevent the removal of the case. It was in no sense a necessary party, as it had no concern whatever with the outcome of the controversy between the plaintiff and the Finance Company. A final decree in favor of plaintiff would naturally run against the Finance Company only, requiring that company to draw a check on the account in favor of the plaintiff. The Trust Company is a mere debtor of the Finance Company, and the fact that the deposit stands in the name of the latter as trustee does not change the relation. *In re Nichols*, 166 Fed. 603; *Minard* v. *Watts*, 186 Fed. 245; *Fletcher* v. *Sharp*, 108 Ind. 276; *Paul* v. *Draper*, 158 Mo. 197; Perry, Trusts, 6th ed., § 122.

It is settled that the citizenship of a merely nominal party is immaterial upon the question of removability on the ground of diverse citizenship. *Walden* v. *Skinner*, 101 U. S. 577; *Barney* v. *Latham*, 103 U. S. 205; *Bacon* v. *Rives*, 106 U. S. 99; *Ex parte Nebraska*, 209 U. S. 436; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77; *New York Construction Co.* v. *Simon*, 53 Fed. 1; *Shattuck* v. *North British Ins. Co.*, 58

Fed. 609; *American National Bank* v. *National Benefit & Casualty Co.*, 70 Fed. 420; *First National Bank* v. *Bridgeport Trust Co.*, 117 Fed. 969; *Harvey* v. *Harvey*, 290 Fed. 653.

On the question of priority as between the assignees, the English rule, that the party who first gives notice is entitled to priority, is the established rule in the federal courts. *Judson* v. *Corcoran*, 17 How. 612; *Spain* v. *Hamilton's Admr.*, 1 Wall. 604; *Laclede Bank* v. *Schuler*, 120 U. S. 511; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633; *Methven* v. *Staten Island Light Co.*, 66 Fed. 113; *The Elmbank*, 72 Fed. 610; *Third National Bank* v. *Atlantic City*, 126 Fed. 413; *In re Hawley Furnace Co.*, 233 Fed. 451; *In re Leterman, Becher & Co.*, 260 Fed. 543. Distinguishing, *Petition of the National Discount Co.*, 272 Fed. 570; *Greey* v. *Dockendorff*, 231 U. S. 513. See further: *Fortunato* v. *Patten*, 147 N. Y. 277; *Graham Paper Co.* v. *Pembroke*, 124 Cal. 117; *Lambert* v. *Morgan*, 110 Md. 1; *Lumber Co.* v. *Newcomb*, 79 Miss. 462; *Jenkinson* v. *New York Finance Co.*, 79 N. J. Eq. 247; *Jack* v. *National Bank*, 17 Okla. 430; *Phillips's Estate*, 205 Pa. St. 515; *Coffman* v. *Liggett*, 107 Va. 418; Pomeroy, Eq. Juris., 4th ed., § 695, note J; 66 L. R. A. 761; 5 Corp. Jur. 953; 19 Yale Law Jour. 258, 263; 60 Univ. of Penna. Law Rev. 668, 669.

Dearle v. *Hall*, 3 Russ. 1; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Meux* v. *Bell*, 1 Hare, 73; Story, Eq. Juris., § 1384. In the federal courts, and in the state courts which follow *Dearle* v. *Hall*, *supra*, the rule is stated and applied without being limited to cases where the second assignee made inquiry or was in fact misled. See the cases and text writers above cited, and also *Lambert* v. *Morgan*, 110 Md. 1; Scott's Cases on Trusts, p. 623.

The question is one of general jurisprudence on which the federal court is not controlled by decisions of the state court. *Methven* v. *Staten Island Light Co.*, 66 Fed.

113; *In re Leterman, Becher & Co.*, 260 Fed. 543; *Swift* v. *Tyson*, 16 Pet. 1.

The rights of owners of choses in action have been constantly dealt with by the federal courts as matters of "general jurisprudence." The question whether a transferee of a negotiable instrument is entitled to rank as a holder for value is such a question. *Swift* v. *Tyson, supra; Oates* v. *National Bank*, 100 U. S. 239; *Railroad Co.* v. *National Bank*, 102 U. S. 14.

So of the right of a purchaser of municipal bonds to rely upon recitals therein, *Presidio County* v. *Noel-Young Bond Co.*, 212 U. S. 58; of the validity of the assignment of an insurance policy, *Russell* v. *Grigsby*, 168 Fed. 577; *New York Life Ins. Co.* v. *Dunlevy*, 214 Fed. 1; of whether the title to checks deposited in a bank passes to the bank in the absence of agreement, *In re Jarmulowsky*, 249 Fed. 319; *In re Grocers Baking Co.*, 266 Fed. 900; of whether an instrument purporting to effect an absolute transfer of title may be shown to have been intended as security only, *Russell* v. *Southard*, 12 How. 139; of the rights of a holder of an insurance policy issued before the payment of the first premium, *MacKelvie* v. *Mutual Benefit Life Ins. Co.*, 287 Fed. 660. See *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543; *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102; *Harper* v. *Hochstim*, 278 Fed. 102; *Johnson* v. *Norton Co.*, 159 Fed. 361.

MR. JUSTICE BUTLER delivered the opinion of the Court.

On May 16, 1919, the Nelson Blower & Furnace Company, a Massachusetts corporation, assigned to the petitioner for a valuable consideration indebtedness to the amount of $45,000 due or to become due to the Nelson Company from the Murray & Tregurtha Corporation, under a contract whereby the Nelson Company was to construct certain engines for the latter. July 15, 1919,

the Nelson Company for a valid consideration assigned to the respondent, Manufacturers' Finance Company, the same indebtedness to the amount of $40,000, and on September 20 made another assignment to the Finance Company of the same indebtedness to the amount of $10,000. Later, about the last mentioned date, the Finance Company notified the debtor of its assignment. Up to that time it had made no inquiry of the debtor as to its indebtedness to the Nelson Company, and neither it nor the debtor had any knowledge of the prior assignment to the petitioner. September 26, 1919, the United States District Court in a suit in equity appointed a receiver of the Nelson Company. About that time each assignee learned of the assignment to the other. October 6, 1919, petitioner and respondent Finance Company agreed that the Nelson Company, acting by its receiver, should finish the work being done for the debtor, and that the net proceeds, which amounted to $7,963.36, a sum less than the amount of the claim of either assignee, should be deposited with the respondent International Trust Company, a Massachusetts corporation, in a special account in the name of the Finance Company as trustee for the one or the other of such assignees thereafter to be agreed by them, or found by some court of competent jurisdiction, to be entitled thereto. They failed to agree, and petitioner brought a bill in equity in the state court against the respondents to establish its right to the amount so on deposit, and to have the same paid to it. For the removal of the suit to the District Court of the United States, the Finance Company filed its petition stating that the International Trust Company is not a necessary party to the suit but is a mere nominal party, being only a stakeholder and without any interest whatever in the result, and that the controversy in the suit is entirely between citizens of different States, Salem Trust Company, a Massachusetts corporation, and the Manufacturers' Finance

Company, a Delaware corporation. Other proper steps were taken, and the case was removed from the state to the federal court. Petitioner moved to remand, asserting that the International Trust Company is a necessary party to the suit, and that the case was improperly removed, because the plaintiff and one of the defendants are citizens of the same State. The motion was denied. The case was tried in the District Court and dismissed on final decree which was affirmed by the Circuit Court of Appeals.

There are two questions for decision: Did the District Court have jurisdiction? Which of the parties is entitled to the fund?

The District Courts have original jurisdiction of controversies between citizens of different States (Constitution, Art. III, § 2; Judicial Code, § 24); and when in any suit brought in a state court, there is a controversy, which is wholly between citizens of different States, and which can be fully determined as between them, a defendant interested in such controversy may remove the suit to the proper District Court of the United States. Judicial Code, § 28. District Courts have jurisdiction if all the parties on the one side are of citizenship diverse to those on the other side.[1] Jurisdiction cannot be defeated by joining formal or unnecessary parties.[2] The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed, (*Barney* v. *Latham*,

[1] *Raphael* v. *Trask*, 194 U. S. 272, 277; *Gage* v. *Carraher*, 154 U. S. 656; *Ayres* v. *Wiswall*, 112 U. S. 187, 192; *Removal Cases*, 100 U. S. 457, 468–469; *Strawbridge* v. *Curtiss*, 3 Cranch, 267; *Chipman* v. *West United Verde Copper Co.*, 271 Fed. 91; *Danks* v. *Gordon*, 272 Fed. 821, 824.

[2] *Wormley* v. *Wormley*, 8 Wheat. 421, 451; *Wood* v. *Davis*, 18 How. 467, 469; *Walden* v. *Skinner*, 101 U. S. 577, 589; *Wilson* v. *Oswego Township*, 151 U. S. 56, 64; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 435; *Wallin* v. *Reagan*, 171 Fed. 758, 763; *Jackson* v. *Jackson*, 175 Fed. 710, 716; *Atchison, T. & S. F. Ry. Co.* v. *Phillips*, 176 Fed. 663, 666.

103 U. S. 205, 215; *Ex parte Nebraska*, 209 U. S. 436, 444) and is not affected by the fact that one of the defendants is a citizen of the same State as the plaintiff, if that defendant is not an indispensable party to the controversy between plaintiff and defendant who are citizens of different States. *Barney* v. *Latham, supra*, 213. The facts set forth in the present bill are substantially those already stated. This suit involves a controversy between the petitioner, a citizen of Massachusetts, and the respondent, the Finance Company, a citizen of Delaware, which can be determined without affecting any interest of the other respondent, the International Trust Company, a citizen of Massachusetts. The latter is not an indispensable party. See *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80. It has no interest in the controversy between the petitioner and the other respondent. Its only obligation is to pay over the amount deposited with it when it is ascertained which of the other parties is entitled to it. On the question of jurisdiction, an unnecessary and dispensable party, will not be considered. *Walden* v. *Skinner*, 101 U. S. 577, 589; *Bacon* v. *Rives*, 106 U. S. 99, 104; *Ex parte Nebraska, supra*. The cases of *Wilson* v. *Oswego Township*, 151 U. S. 56, and *Construction Co.* v. *Cane Creek*, 155 U. S. 283, do not support the contention that this case was not properly removed to the federal court. These cases hold that where the object of the suit is to recover possession of personal property the one in possession is a necessary and indispensable, and not a formal, party. Here, no cause of action exists against the International Trust Company, because it has not been determined which of the other parties is entitled to payment. The District Court had jurisdiction. The motion to remand was rightly denied.

As between successive assignees of the same account receivable, does prior notice to the debtor of the later assignment without more subordinate the rights of the earlier to those of the later assignee?

There is a conflict of authority on the question. Under decisions of the Supreme Judicial Court of Massachusetts, which are in harmony with the decisions of the highest courts in a number of the States,[3] the earlier assignee would prevail. The courts below held the question to be one of general jurisprudence, declined to be bound by the Massachusetts decisions, and followed what they understood the rule to be, as applied by this and other federal courts,[4] and in a number of the States,[5] and decided that the later assignee, the first to give notice to the debtor, is entitled to the money.

The question is one of general law, not based on any legislation of the State or local law or usage, and the

[3] *Putnam* v. *Story*, 132 Mass. 205, 211; *Tingle* v. *Fisher*, 20 W. Va. 497, 506, 510; *Meier* v. *Hess*, 23 Ore. 599, 603; *Columbia Finance & Trust Co.* v. *First National Bank*, 116 Ky. 364, 375; *Fortunato* v. *Patten*, 147 N. Y. 277, 283; *Hawk* v. *Ament*, 28 Ill. App. 390, 394; *Harris County* v. *Campbell*, 68 Tex. 22, 29; *White* v. *Wiley*, 14 Ind. 496; *Maybin* v. *Kirby*, 4 Richardson (S. C.) 105, 114. See also *Thayer* v. *Daniels*, 113 Mass. 129, 131; *Herman* v. *Mutual Life Ins. Co.*, 218 Mass. 181, 186. *Rabinowitz* v. *People's National Bank*, 235 Mass. 102; *MacDonald* v. *Kneeland*, 5 Minn. 352, 361, 365; *Bellingham Bay Boom Co.* v. *Brisbois*, 14 Wash. 173, 176; *Trust Co.* v. *Krouse*, 22 Ohio C. C. (N. S.) 216; *Houser* v. *Richardson*, 90 Mo. App. 134, 139.

[4] *Judson* v. *Corcoran*, 17 How. 612; *Spain* v. *Hamilton's Administrator*, 1 Wall. 604; *Laclede Bank* v. *Schuler*, 120 U. S. 511; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633; *Methven* v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113; *In re Leterman, Becher & Co.*, 260 Fed. 543.

[5] *Graham Paper Co.* v. *Pembroke*, 124 Cal. 117, 120; *Lambert* v. *Morgan*, 110 Md. 1, 26; *Jenkinson* v. *New York Finance Co.*, 79 N. J. Eq. 247, 257; *Jack* v. *National Bank*, 17 Okla. 430, 435; *Phillips's Estate*, 205 Pa. St. 515, 521; *Vanbuskirk* v. *Hartford Fire Insurance Co.*, 14 Conn. 141, 144; *Dillingham* v. *Insurance Co.*, 120 Tenn. 302, 309; *Bank* v. *Insurance & Trust Co.*, 17 App. D. C. 112, 124; *Ward & Co.* v. *Morrison*, 25 Vt. 593, 599. See also *Merchants & Mechanics Bank* v. *Hewitt*, 3 Iowa, 93, 102; *Lumber Co.* v. *Newcomb*, 79 Miss. 462, 466; *Perkins* v. *Butler County*, 44 Nebr. 110, 116.

lower court rightly decided that it was not bound by the rule applied in the decisions of the highest court of Massachusetts. *Swift* v. *Tyson*, 16 Pet. 1, 18; *Boyce* v. *Tabb*, 18 Wall. 546; *Railroad Company* v. *National Bank*, 102 U. S. 14, 28; *Presidio County* v. *Noel-Young Bond Co.*, 212 U. S. 58, 73; *Methven* v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113; *In re Leterman, Becher & Co.*, 260 Fed. 543, 547.

The precise question now before us was not involved, and therefore was not decided, in any of the decisions of this Court cited by the Circuit Court of Appeals.

In *Judson* v. *Corcoran*, 17 How. 612, one Williams had a claim against Mexico for the illegal confiscation of a cargo. Under a treaty with Mexico (9 Stat. 922) such claims were to be adjusted by the United States upon allowance by a board of commissioners created by an act of Congress. 9 Stat. 393. Judson obtained from Williams an assignment of an interest in the claim. Later Corcoran obtained assignments covering the whole claim. The board found that Corcoran owned the whole claim and made an award in his favor. Judson set up no pretensions to the claim until after the award, some six years from the time he obtained the assignment. This Court (p. 614) pointed out that the assignor, having parted with his interest by the first assignment, the second assignee could take nothing by the later assignment; that the purchaser is entitled only to the remedies of the seller, and hence has arisen the maxim that "he who is first in time is best in right." The second assignee had drawn to his equity a legal title to the fund (the award of the board of commissioners); and it was said that,—assuming that no negligence could be imputed to the earlier assignee and that the case was one where an equity in the same chose in action was successively assigned to two innocent persons whose equities are equal,—there must be applied the rule that "the equities being equal, the law must prevail."

The court said (p. 615): "There may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, (as in this instance,) would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy."

Judson took his assignment in 1845 and first produced it in 1851. In the meantime, Corcoran got his assignment, gave notice, and prosecuted it to final award. It was held that he was entitled to the fund. Clearly that case does not hold that mere priority of notice by a later assignee will subordinate the rights of the first purchaser.

In *Spain* v. *Hamilton's Administrator*, 1 Wall. 604, the fund was one-tenth of the amount to be received from the United States on account of bonds of the Republic of Texas, after payment of a debt owed by a bank to one Wetmore, which the bonds were pledged to secure. Wetmore was trustee to make collection. The bank gave Hamilton an order on him for the fund. Hamilton made the following assignments: February 12, 1850, to Spain in general terms, without limit as to amount and not identifying the fund. August 30, 1850, to Wetmore for $2,500. September 21, 1850, to Corcoran & Riggs for $30,000, which was presented to and accepted by Wetmore. April 30, 1851, to Robb, the whole fund, subject to Wetmore's claim and that of Corcoran & Riggs. Robb gave notice immediately and later obtained judgment and made seizure of the residuary fund. Hill succeeded to the rights of Robb. The one-tenth covered by the order of the bank in favor of Hamilton was left in the Treasury, subject to the assignments. May 10, 1856, Spain brought suit, claiming the fund under the document of February 12, 1850. Up to this time, neither Wetmore nor any of

the other assignees had heard of Spain's claim against the fund.

In its decision, this Court referred to Spain's negligence and delay. It adverted to the rule that the assignee is entitled to the remedies of the assignor and is subject to all the equities between him and his debtor, and said: (p. 624) "But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee [assignor] before such notice."

If a debtor pays, or becomes bound to pay, a later assignee, he is not liable to an earlier assignee who failed to give him notice of his assignment. And if, without notice of any assignment, he pays the assignor he cannot be held by the assignee. To safeguard against such things, it is necessary for an assignee to give the debtor notice of his assignment. But it does not follow that mere priority of notice of the later assignee, who took nothing by his assignment, will subordinate the rights of an earlier assignee. That case does not establish or apply the rule contended for by respondent.

In *Laclede Bank* v. *Schuler*, 120 U. S. 511, it was held that a bank is not liable to a holder of a check which was not presented for payment until after the drawer had made a general assignment for the benefit of creditors, and directed the bank to hold the fund subject to the order of the assignee. This case does not support the rule applied by the Circuit Court of Appeals. A check in usual form does not constitute an assignment. It is an order which may be countermanded at any time before it is cashed. *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, 643; *Florence Mining Co.* v. *Brown*, 124 U. S. 385, 391.

The doctrine that mere priority of notice to trustee or debtor gives priority of right to a later assignee over an

earlier assignee of a chose in action is generally referred to *Dearle* v. *Hall* and *Loveridge* v. *Cooper*, 3 Russell, 1, decided at the same time and upon the same principle. The leading case is *Dearle* v. *Hall*. In that case, there was much more in favor of the second assignee than mere priority of notice. Brown, *cestui que trust* under his father's will, made three assignments of income payable to him during his life by the executors. The two earlier assignments were made to Dearle and Sherring, respectively. Each was for a part of the annual income. By the terms of the assignments the assignor was permitted to continue to collect, and for years he did collect, the income assigned. No notice of the earlier assignments was given to the executors. Before he purchased, Hall, the latest assignee, diligently inquired of the trustees as to Brown's title and the amount of income paid him. The trustees knew of no assignments, and without any suspicion of prior incumbrance, Hall in good faith purchased the entire claim. He gave immediate notice of his assignment to the trustees and received assurance that the income would be paid to him. When it became due, an installment was paid to him. Thereafter, the earlier assignees gave notice and demanded payment under their respective assignments. The trustees withheld all payments. Suit was brought by Dearle and Sherring against Hall to establish priority of their assignments over his. In the lower court, Sir Thomas Plumer, M. R., gave judgment in favor of Hall, and it was affirmed by Lord Lyndhurst, L. C. Two grounds of the decision may be gathered from the opinions: (1) That the negligence of the prior assignees in failing to give notice to the trustees resulted in Hall being induced to purchase without knowledge of the prior assignments. (2) That notice to the trustees was necessary to perfect title,—as, "the act of giving the trustee notice is in a certain degree taking possession of the fund." (See *Ward* v. *Duncombe*, L. R. A. C. [1893] 369, 387.) These cases

did not decide that notice by a subsequent assignee after his purchase, without any inquiry in advance of his purchase, will subordinate the title of the prior assignor to that of the later. No such questions were involved. But later, in the case of *Foster* v. *Cockerell*, in the House of Lords, 3 Cl. & F. 456, that question was decided in favor of the subsequent assignee, and it appears to have become the settled rule in England. However, it has been the subject of much discussion and explanation by the English courts. See *Wilmot* v. *Pike*, 5 Hare, 14; *Ward* v. *Duncombe*, *supra*. It appears that in 1814 in *Cooper* v. *Fynmore*, 3 Russell, 60, Sir Thomas Plumer, V. C., himself decided that mere neglect of notice was not sufficient to postpone the first assignee, and held (p. 64): "In order to deprive him of his priority, it was necessary that there should be such laches as, in a court of equity, amounted to fraud." In 1827, *Dearle* v. *Hall* and *Loveridge* v. *Cooper* were decided. In 1833, Lord Lyndhurst, then Chief Baron, in *Smith* v. *Smith*, 2 Cr. & M. 231, in the Court of Exchequer, held that the second assignee in order to obtain priority must show that he exercised proper caution in taking the assignment, and that he had applied to the trustees to know if any previous assignment had been made, and that, unless he so applied to each of the trustees, he would not have exercised due caution or done all that he ought to have done. Lord Herschell, in *Ward* v. *Duncombe*, *supra*, said (p. 380): "The language thus used by the Chief Baron is somewhat remarkable. It would seem, if correctly reported, to indicate the view that a second incumbrancer would only obtain priority over an earlier one if he had used due caution, and had, in fact, made such inquiry as a prudent man would of each of the trustees. This view is in direct conflict with the decision of this House two years later in *Foster* v. *Cockerell* in which Lord Lyndhurst himself delivered the leading opinion." Undoubtedly the first application of

the rule that mere priority of notice gives priority of right was in *Foster* v. *Cockerell*, but it is always referred to *Dearle* v. *Hall* and *Loveridge* v. *Cooper*. In *Ward* v. *Duncombe*, the earlier decisions by which the rule was established were discussed by Lord Herschell and Lord Macnaghten. The opinions leave the impression that the rule itself was not deemed to be wholly satisfactory, and that it is not very clear upon what principle it rests. *Ward* v. *Duncombe*, *supra*, 391.

There is no decision of this Court which sustains the contention that, as between successive assignees of the same chose in action, mere priority of notice gives priority of right. It seems to us that the better reasons are against such a rule. By the first assignment, the rights of the assignor pass to the assignee. The creditor has a right to dispose of his own property as he chooses and to require the debt to be paid as he directs, without the assent of the debtor. See Story, Equity Jurisprudence, 11th ed., § 1057. Notice of the assignment to the debtor adds nothing to the right or title transferred. A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give. See *Judson* v. *Corcoran*, *supra*, 614. If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee. Failure of the first assignee to give notice does not divest him of any title or right or vest any claim in a subsequent purchaser. It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the incumbrance by inquiry of the debtor having notice of the earlier assignment. *Low* v. *Bouverie*, (1891) L. R. 3 Ch. 82, 99. Compare *Ward* v. *Duncombe*, *supra*, 393. It is impossible to eliminate all risk from such a transaction. If the second assignee elects to rely on the

representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception.

Facts and circumstances may create an equitable estoppel against the first assignee. *Herman* v. *Mutual Life Insurance Co.*, 218 Mass. 181; *Rabinowitz* v. *People's National Bank*, 235 Mass. 102.[6] It would be unconscionable to permit him to prevail over a later assignee whom he had misled or deceived in respect of the assignor's title at the time of purchase by the latter. But, assuming a duty on the first purchaser to protect a subsequent assignee against deception and fraud by the assignor, there is no ground for subordinating his claim, unless his failure was an element in or contributed to the deception. In the absence of inquiry by the subsequent purchaser, the failure of the first to give notice is immaterial.

In a case where, as here, the later assignee has made no inquiry of the debtor in advance of taking his assignment, there is no analogy between the giving of notice by the

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[6] In *Ward* v. *Duncombe*, Lord Macnaghten said (p. 391):

"The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen* (L. R. 7 E. & I. at p. 506): 'A pre-existing equitable title,' said Lord Cairns, 'may be defeated by a supervening legal title obtained by transfer'—he was there speaking of an equitable title to shares. Then he goes on: 'And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.'"

first assignee to the debtor and the taking of possession of tangible personal property by a purchaser. It is impossible in any real sense to transfer possession of accounts receivable or the like, and, as to them, an assignee does not become clothed with the *indicia* of ownership as does one taking possession of tangible things. It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to or an element in acquisition of title.

The result will be the same if it be assumed that each *bona fide* purchaser takes merely an equity in the chose in action assigned. If equities are equal, the first in time is best in right. Otherwise the stronger equity will prevail. While there are contingencies which entitle the second to prevail over the first assignee,[7] we hold that mere priority of notice to the debtor by a second assignee, who lent his money to the assignor without making any inquiry of the

[7] In Professor James Barr Ames' Cases on Trusts, 2nd ed., in a note on *Dearle* v. *Hall*, it is said (p. 328): "Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee. E. g. (1) If, acting in good faith, he obtains payment of the claim assigned; *Judson* v. *Corcoran*, 17 How. 612; *Bridge* v. *Conn. Company*, 152 Mass. 343; *Bentley* v. *Root*, 5 Paige 632, 640; or (2) if he reduces his claim to a judgment in his own name; *Judson* v. *Corcoran*, 17 How. 612; *Mercantile Company* v. *Corcoran*, 1 Gray 75; or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself, *N. Y. Company* v. *Schuyler*, 34 N. Y. 30, 80; *Strange* v. *Houston Company*, 53 Tex. 162; or (4) if he obtains the document, containing the obligation, when the latter is in the form of a specialty. *Re Gillespie*, 15 Fed. 734; *Bridge* v. *Conn. Company*, 152 Mass. 343; *Fisher* v. *Knox*, 13 Pa. 622. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of this legal right."

debtor, is not sufficient to subordinate the first assignment to the second. The petitioner is entitled to the fund.

Decree reversed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur on the ground that the rights of the parties are governed by the law of Massachusetts.